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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 97

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

vs.

SANTA FE PACIFIC RAILROAD COMPANY

No. 98

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

vs.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 3, 1946
CERTIORARI GRANTED JUNE 10, 1946

SUPREME COURT OF THE UNITED STATES

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1 In the United States Court of Appeals, District of Columbia

No. 8956

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, OSCAR L. CHAPMAN, FRED W. JOHNSON, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Joint appendix

In United States District Court

Complaint for injunction and relief in the nature of mandamus

Filed March 7, 1944

1. Plaintiff, Santa Fe Pacific Railroad Company, is a corporation created and organized under the Act of March 3, 1897, c. 374, 29 Stat. 622, and sues in its own right and as lawful successor to the Atlantic and Pacific Railroad Company, a corporation created and organized under the Act of July 27, 1866, c. 278; 14 Stat. 292.

2 2. The defendants are residents of the District of Columbia, the defendant Harold L. Ickes being Secretary of the Interior and as such charged by law with the administration of the laws of the United States relating to public lands, the defendant Oscar L. Chapman being Assistant Secretary of the Interior and charged with like duties under the direction of the Secretary and in particular with the supervision of the General Land Office, and the defendant Fred W. Johnson being Commissioner of the General Land Office and charged by law with the administration of that office under the supervision and direction of the Secretary and Assistant Secretary of the Interior. The defendants are sued individually and in view and because of acts done or threatened by them under color of their offices and authority.

3. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $3,000, and involves the construction of certain laws of the United States under which plaintiff claims vested rights in and to certain public lands, and the duty of the defendants, respectively, to determine plaintiff's rights in and to the lands in question and plaintiff's right to a patent to the said

lands, upon a proper construction of the laws under which plaintiff's rights are claimed, and without regard to a certain release executed by plaintiff and filed with the defendant, the Secretary of the Interior, as hereinafter more particularly stated.

4. Plaintiff, Santa Fe Pacific Railroad Company, is successor to the Atlantic and Pacific Railroad Company and to the land grant to the latter company under the Act of July 27, 1866, c. 278, 14 Stat. 292, and is fully vested with all the rights of the Atlantic and Pacific Railroad Company under the said Act of July 27, 1866, in and to the lands thereby granted.

5. Included in the lands so granted, and acquired and owned by plaintiff as successor to the said Atlantic and Pacific Railroad Company, prior to December 18, 1911, were the following
3 described lands in New Mexico, to wit, the SW¼SW¼ and the SE¼NE¼ of Section 29, Township 10 North, Range 2 West, New Mexico Meridian, being lands within the primary limits of the said grant, title to which vested in plaintiff's predecessor, the Atlantic and Pacific Railroad Company, as of March 2, 1872, upon the definite location of the said railroad.

6. November 2, 1911, plaintiff was requested by the Commissioner of the General Land Office, acting for the Secretary of the Interior, to relinquish to the United States said Section 29 of Township 10 North, Range 2 West, New Mexico, the relinquishment to be made under the Act of April 28, 1904, 33 Stat. 556, entitled An Act for the relief of small-holding settlers within the limits of the grant to the Atlantic and Pacific Railroad Company in the Territory of New Mexico, which provided as follows:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

A copy of the letter of the Commissioner of the General Land Office, dated November 2, 1911, requesting the relinquishment, is attached hereto and made part hereof, marked Exhibit A.

7. Thereafter, by deed of relinquishment dated December 18, 1911, plaintiff relinquished the said Section 29 above described including the $SW\frac{1}{4}SW\frac{1}{4}$ and the $SE\frac{1}{4}NE\frac{1}{4}$ thereof, to the United States, under the said Act of April 28, 1904, and the same was accepted and approved by the Commissioner of the General Land Office and the Secretary of the Interior. Copies of the deed of relinquishment and accompanying letter dated February 12, 1912, from Britton & Gray, Attorneys for Santa Fe Pacific Railroad Company, to the Commissioner of the General Land Office, of letter dated March 5, 1912, from the Commissioner of the General Land Office to the Secretary of the Interior recommending approval, with approval by the First Assistant Secretary of the Interior dated March 21, 1912, and letter dated May 22, 1912, from the Commissioner of the General Land Office to Britton & Gray authorizing the selection of other lands in lieu of the lands relinquished, under the said Act of April 28, 1904, are attached hereto and made part hereof, marked Exhibit B.

8. Thereafter, August 28, 1940, plaintiff, Santa Fe Pacific Railroad Company, exercised the right of selection, based on the relinquishment of the said $SW\frac{1}{4}SW\frac{1}{4}$ and $SE\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, New Mexico, acquired as stated in paragraph 7 supra, by making and filing selections, under the Act of April 28, 1904, of certain lands, to wit, the $SW\frac{1}{4}SW\frac{1}{4}$ of Section 33, Township 7 North, Range 10 West, and the $SE\frac{1}{4}SW\frac{1}{4}$ of Section 35, Township 7 North, Range 10 West, New Mexico (the said lands so selected being vacant public land available for selection), in lieu of the designated base or relinquished lands above described, to wit, the $SW\frac{1}{4}SW\frac{1}{4}$ and $SE\frac{1}{4}NE\frac{1}{4}$ of Section 29, Township 10 North, Range 2 West, New Mexico, the latter not having been theretofore designated as base for any similar selections and being valid for that purpose. The said selections were filed in the local land office of the Department of the Interior, at Las Cruces, New Mexico, in accordance with the regulations of the Department of the Interior (Title 43, Code of Federal Regulations, sections 273.56–273.57), being designated as Las Cruces 058331 and 058332, and in due course were forwarded to the General Land Office for further action.

9. December 18, 1940, while the said selections were pending and as yet unapproved, plaintiff, Santa Fe Pacific Railroad Company, filed with the Secretary of the Interior, pursuant to section 321 (b), Title III, Part II, of the Transportation Act of 1940, be-

ing the Act of September 18, 1940, c. 722, 54 Stat. 954, U. S. Code, Title 49, secs. 65–66, a release of

"any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."

The said release was accepted and approved by the Secretary of the Interior on March 1, 1941. A copy thereof is attached hereto and made part hereof, marked Exhibit C.

10. June 12, 1943, by decision of the Commission of the General Land Office, plaintiff was notified that in view of the said release the Santa Fe Pacific Railroad Company had no further rights under the Act of April 28, 1904, and that the said selections, Las Cruces 058331 and 058332, would be rejected.

11. Thereafter, on or about July 10, 1943, in accordance with the regulations and rules of practice of the Department of the Interior, plaintiff appealed to the Secretary of the Interior from the decision of the Commissioner of the General Land Office rejecting the said selections.

12. January 8, 1944, the defendant, Oscar L. Chapman, as Assistant Secretary of the Interior, acting for the defendant the Secretary of the Interior, affirmed the decision of the Commissioner of the General Land Office. A copy of the said decision, dated January 8, 1944, is attached hereto and made part hereof, marked Exhibit D.

6 13. January 18, 1944, plaintiff filed with the Secretary of the Interior a motion for rehearing. February 8, 1944, plaintiff's motion for rehearing was denied by the defendant the Assistant Secretary of the Interior.

14. Plaintiff avers that its right under the Act of April 28, 1904, to select other lands, in lieu of the lands relinquished and conveyed to the United States as hereinabove stated, was and is a contractual right derived from the said Act of April 28, 1904, and the relinquishment and conveyance to the United States of the base lands above described, at the request of the Secretary of the Interior; that plaintiff has fully performed its obligation under the said contract by relinquishing and conveying to the United States the said base lands as requested; that the lands so relinquished and conveyed to the United States have not been designated or used as base for any other selections; that plaintiff is entitled to the lands selected subject to the approval of the Secretary of the Interior

upon a determination that the said lands are "vacant public land of equal quality" with the base lands; that the release, described in paragraph 9 supra, does not apply to and does not include rights of selection under the Act of April 28, 1904, because it is a release of claims to lands, or interests therein, granted to plaintiff or its predecessor in interest in aid of the construction of any portion of its railroad, whereas plaintiff's rights under the Act of April 28, 1904, are of a different character and not derived from any grant to plaintiff or its predecessor; that in rejecting the said selections on the ground that the approval thereof is barred by the said release the defendants have acted on an erroneous construction of the law and have gone beyond the authority and powers conferred on them by law and have arbitrarily disregarded and departed from their plain duty to approve the said selections if found to be otherwise valid and in accord with the law and regulations.

15. Plaintiff further avers that the action of the defendants in rejecting the said selections on the ground stated and in denying plaintiff's right to a patent to the lands selected is in violation of plaintiff's vested rights in and to the said lands and casts a cloud on plaintiff's title and right thereto; that plaintiff has exhausted all remedies, by appeal or otherwise, in the Department of the Interior, and that its only remaining remedy is by application to this court for a decree enjoining the defendants from rejecting the said selections on the ground stated, and directing the defendants to determine plaintiff's right to the approval of the said selections without regard to the release filed by plaintiff pursuant to section 321 (b) of the Transportation Act of 1940; that unless such relief is granted plaintiff will be wholly denied and deprived of its rights under the said Act of April 28, 1904, in violation of the law and of the terms of the said contract, and will suffer loss and injury for which it has no other remedy whatever.

Wherefore, the premises considered, plaintiff prays:

1. For a temporary restraining order or injunction, pendente lite, and upon final hearing a decree, enjoining the defendants from rejecting the said selections filed by plaintiff under the Act of April 28, 1904, on the ground that they are barred and all rights of the plaintiff therein extinguished by the release filed pursuant to section 321 (b) of the Transportation Act of 1940; and directing the defendants to determine the rights of the plaintiff in the said selections and to the lands selected, without regard to the said release.

2. For such other and further relief as the case may require and may be necessary and appropriate.

SANTA FE PACIFIC RAILROAD COMPANY,
By LAWRENCE CAKE, *Attorney.*

8 DISTRICT OF COLUMBIA:

I, Lawrence Cake, being duly sworn depose and say, that I am attorney for Santa Fe Pacific Railroad Company, a corporation, that I have read the above complaint, and that I verily believe the facts therein stated to be true.

LAWRENCE CAKE.

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 28th day of February 1944.

[SEAL]

ALMA B. NEWELL,
Notary Public.

LAWRENCE CAKE,
717 National Press Building, Washington, D. C.
Attorney for Plaintiff.

Exhibit C to complaint

RELEASE

Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

9 This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

In witness whereof, Santa Fe Pacific Railroad Company has caused this Release to be signed in its corporate name and acknowledged or proved by its President and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary, this 17th day of December 1940.

[SEAL] SANTA FE PACIFIC RAILROAD COMPANY,
By (Sgd.) E. J. ENGEL, *Its President.*
Attest:
(Sgd.) R. M. HOGIN, *Its Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this 17th day of December 1940, before me, the undersigned George Julius Howard, a notary public within and for the county aforesaid, appeared E. J. Engel and R. M. Hogin, to me personally known, who, being by me severally and duly sworn, did say that he, the said E. J. Engel, is the President, and he, the said R. M. Hogin, is the Secretary, of Santa Fe Pacific Railroad Company, the corporation which executed the foregoing instrument, and that the seal affixed thereto is the corporate seal of said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and the said E. J. Engel, as President as aforesaid, and the said R. M. Hogin, as Secretary as aforesaid, acknowledged before me the said instrument to be the free act and deed of said corporation, and acknowledged that they, as President and Secretary respectively, executed the said instrument on behalf of said corporation for the purpose and consideration therein expressed.

Witness my hand and notarial seal this 17th day of December 1940.

(Sgd.) GEORGE JULIUS HOWARD,
Notary Public.

My commission expires March 30, 1941.

Exhibit D to complaint

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, January 8, 1944.

A. 23690.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Las Cruces 058331, 058332.
Application for selection of lieu lands rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICES

* * * * *

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of June 12, 1943, rejecting its applications, Las Cruces 058331 and 058332, to select the SW¼SW¼ Sec. 33, T. 7 S., R. 10 W., N. M. M., in lieu of the SW¼SW¼ of Sec. 29, T. 10 N., R. 2 W., N. M. M.; and the SE¼SW¼ Sec. 35, T. 7 S., R. 10 W., N. M. N., in lieu of the SE¼NE¼ Sec. 29, T. 10 N., R. 2 W., N. M. M., all in the State of New Mexico.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the construc-
11 tion of its railroad in the act of July 27, 1866 (14 Stat. 292).

The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at foreclosure sale and by the act of March 3, 1897 (29 Stat. 622), Congress confirmed the grant of July 27, 1866, to the Santa Fe Company. On December 26, 1911, acting pursuant to the act of April 28, 1904 (33 Stat. 556), and the regulations issued thereunder (43 CFR 273.56-273.57), the Santa Fe Company relinquished to the United States certain portions of the granted land which were then claimed by settlers. The relinquishment was approved on March 21, 1912, and by letter of May 22, 1912 ("F" 236212 CSB) the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select an equal quantity of land of equal quality within the Territory of New Mexico in lieu of the land relinquished.

On August 28, 1940, the Santa Fe Company filed its applications to select lieu lands with the register at Las Cruces, New Mexico. The register suspended the applications because of the Santa Fe Company's failure to tender the required fees and to file accompanying applications for classification of the land under section 7 of the Taylor Grazing Act (48 Stat. 1272, 43 U. S. C. sec. 315e). The filing fees were paid on October 2, 1940, and the petitions for classification were filed on October 10, 1940.

On December 18, 1940, in accordance with section 321 (b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65) and the regulations issued thereunder (43 CFR 273.61-273.67), the Santa Fe Company, together with the Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company

"* * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to

lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have
12 been granted, or claimed should have been granted by any act of the Congress to San Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad * * *"

The releases stated that they did not embrace

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 19, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The releases were approved March 1, 1941.

On June 12, 1943, the Commissioner of the General Land Office rejected the selections on the ground that the release of December 18, 1940, relinquished all rights the Santa Fe Company had under the act of April 28, 1904, and refused to consider the petitions for classification because of the rejection of the selections.

In this appeal, the Santa Fe Company alleges that the release of December 18, 1940, filed pursuant to the Transportation Act of 1940, did not relinquish rights which had accrued under the Act of April 28, 1904, and that it was deprived of the right to prove that the selection was protected by the saving clause of section 321 (b) of Part II, Title III of the Transportation Act applicable to innocent purchasers. Thus the appeal presents but two questions to be determined: (1) Whether or not the selection right accruing under the act of April 28, 1904, was included in the release of December 18, 1940. (2) Whether or not appellant was illegally deprived of the right to show that this selection right was excepted from the release under the innocent purchaser provision of the saving clause of section 321 (b) of Part II, Title III of the Transportation Act of 1940.

The act of April 28, 1904, provides:

"That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when
13 requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to

select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

The enactment of this statute followed the act of March 3, 1891 (26 Stat. 861), as amended by the act of February 21, 1893 (27 Stat. 470), which recognized the validity of the claims of occupants of land within the States of Colorado, Nevada, and Wyoming and the Territories of New Mexico, Arizona, and Utah who had been in adverse possession for 20 years and permitted each of such occupying claimants to retain 160 acres of such land. The act of April 28, 1904, gave the Santa Fe Company as successor in interest of the Atlantic and Pacific Railroad Company an option to relinquish or to reconvey to the United States, at the request of the Secretary of the Interior, such portions of its lands in the Territory of New Mexico, which it had acquired under the grant of July 27, 1866, as had been occupied by settlers for a period of 25 years. Upon exercise of the option, the Santa Fe Company became entitled to select and to have patented to it, in lieu of the land acquired under the grant of 1866, other land of equal quality within the Territory of New Mexico.

From the foregoing, it is evident that the purpose of the act of April 28, 1904, was to reimburse the Santa Fe Company for losses in the grant of July 27, 1866, occasioned by the inability of
14 the United States to furnish good title to lands acquired from Mexico under the treaty of Guadalupe-Hidalgo in 1848 and the Gadsden purchase of 1853 which were occupied by settlers who had entered in good faith. The Santa Fe Company exercised the option to relinquish two 40-acre tracts to which it was entitled under the grant of 1866 and thus became entitled to select and to receive patent to other land in lieu thereof. The 1904 act operated to replace losses in the original grant of 1866. Land acquired under the later act was to be substituted for land included in the grant of July 27, 1866. It cannot therefore be disputed that the grant of 1904 was in aid of the construction of a railroad.

The Transportation Act of 1940 required the land grant railroads to file releases of all claims under any grant of land "to aid in the construction of a railroad" as a condition precedent to the grant of the privilege of charging the United States full rates for transportation of freight and passengers, with certain exceptions. And the release filed by the Santa Fe Company covered any and all claims under "any act of Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely claims arising under the original grant of July 27, 1866. It follows that all claims arising under the grant of 1904 were relinquished by this release unless specifically excepted by its terms.

The release excepts only lands sold to an innocent purchaser for value prior to September 18, 1940, lands patented or certified to the company or any predecessor in interest and "lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940." Appellant's present claim does not fit any of these categories. There is no proof that the land which th Santa Fe Company now seeks to select was ever sold to an innocent purchaser. There is no showing that patent to the land was ever issued to the Santa Fe Company. There was no approved selection prior to September 18, 1940, when
15 the Transportation Act became effective. It is true that a selection list was offered for filing on August 28, 1940, but there was no payment of the required filing fees at that time. The application for selection was not effective until October 2, 1940, when the filing fees were paid (43 C. F. R. 273.58). But this application was not approved by the Secretary.

Clearly, in the absence of an approved selection prior to September 18, 1940, appellant has no claim against the United States to any of the lands involved. The release included all rights which the Santa Fe Company had and the right now asserted was not included in the exceptions. It is true that upon the Santa Fe Company's relinquishment of granted lands the United States became obligated to convey such lands as the Company should select in lieu thereof, but the United States incurred no obligation in the absence of a selection of the lieu land. The Santa Fe Company relinquished its right to select lieu lands in exchange for the benefits of the Transportation Act of 1940. It is now enjoying those benefits and is, therefore, precluded from insisting upon a return of the consideration. This Department is not concerned with the wisdom of the bargain that was made, but it is obliged to measure the present rights of the Santa Fe Company in the light of that bargain.

Appellant's further allegation of error that because of his decision of June 12, 1943, the Commissioner afforded it no opportunity to prove that its attempted selection was made in the interest of innocent purchasers whose rights had accrued long prior to September 18, 1940, is without merit. The assertion of this contention is a denial of appellant's first contention that the claim now asserted was not covered by the release filed on December 18, 1940, since obviously the alleged selection could be protected under the saving clause of section 321 (b) of Part II, Title III, of the Transportation Act of 1940, only because it was subject to the release required by that act. The Department finds that this claim was subject to the release, but that appellant is not entitled
16 to the protection of the innocent purchaser provision because it has not shown that it is entitled to such protection.

The regulations of December 10, 1940 (43 C. F. R. 273.70) require that:

"* * * Full details of the alleged sale must be furnished, such as dates, the terms thereof, the estate involved, consideration, parties, amounts and dates of payments made, and amounts due, if any, description of the land, and transfers of title * * * No application for a patent under this act will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent * * *"

Appellant has made no effort to comply with these provisions of the regulations. It merely makes the assertion in its argument on appeal that the Commissioner gave it no opportunity to offer proof that innocent purchasers' rights are involved. The Commissioner was not required to do so; under the regulations, the burden is upon the applicant to assert and establish such rights. Appellant failed to furnish the Commissioner with proof of sale to an innocent purchaser and has made no attempt to do so during the pendency of the appeal. The Department cannot supply such proof. Accordingly, the appeal must be determined without consideration of the rights of innocent purchasers.

The Commissioner's decision is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

* * * * *

Defendant's Exhibit 1—CA-23,373

* * * * *

Filed Nov. 16, 1944.

17 UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, February 8, 1944.

A. 23690.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Las Cruces 058331, 058332.
Application for selection of lieu land rejected.
Motion denied.

MOTION FOR REHEARING

In a decision dated January 8, 1944, the Department affirmed the decision of the Commissioner of the General Land Office of June 12, 1943; rejecting the Santa Fe Pacific Railroad Company's applications, Las Cruces 058331 and 058332, to select certain land in New Mexico in lieu of an equal quantity of land acquired under

the grant of July 27, 1886, and relinquished to the United States pursuant to the act of April 28, 1904. The Santa Fe Company has filed a motion for rehearing, contending that the holding that its selection right accruing under the act of April 28, 1904, was extinguished by the releases filed on December 18, 1940, is based upon a fundamental misconception of its rights under that act; that the decision deprives it of vested rights which are distinct and apart from the claims released under the Transportation Act of 1940. Appellant further declares that the decision that the act of 1904 is a grant in aid of the construction of a railroad is a conclusion not justified by the terms of the act and is directly contrary to the decision of the Supreme Court in Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197.

It is not disputed that the release filed by appellant on December 18, 1940, covered all claims to any grant of land in aid of the construction of a railroad from the United States to itself or to any predecessor in interest. Likewise, it is not disputed that the claim now asserted arises under the act of April 28, 1904.

18 In accordance with the provisions of that act, the Santa Fe Company relinquished land to which it was entitled under the grant of July 27, 1866, to aid in the construction of a railroad, and thereby became entitled to select other land within the State of Mexico to replace the land which it had relinquished. It is true, as the decision of January 8, 1944, recognizes, that the Company was not required to relinquish any land included in the grant of July 27, 1866, but because in the act of March 3, 1891, the United States had recognized the validity of the claims of occupants who had been in adverse possession of some of this land for 20 years, it gave the successor in interest of the Atlantic and Pacific Railroad Company an option to relinquish land which was occupied by such settlers and promised to permit the Company to select other land in lieu of the relinquished land. It is apparent, therefore, that any land acquired by the Santa Fe Company under the act of April 28, 1904, was a substitute for land granted by the act of July 27, 1866, in aid of the construction of its railroad. Consequently any land claimed under the 1904 act is also in aid of the construction of a railroad and is, therefore, included in the release filed on December 18, 1940.

In Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197, and United States ex rel. Santa Fe Pac. R. Co. v. Work, 4 F. (2d) 172, the courts determined nothing more than that in approving or disapproving a selection under the act of 1904, the Secretary of the Interior is required to consider the status of the lands at the time of the selection without reference to facts subsequently discovered. The Supreme Court recognized that "the moment that lands were relinquished at the request of the Secretary a contract

was made, and the government was bound to convey such vacant lands within the territory as the company should select * * *" (259 U. S. 199), but there is nothing in either of these decisions which supports appellant's contention that the act of 1904 was not a granting act. Moreover, the courts have recognized a contractual relationship between the United States and the grantees of the railroad grants. The existence of a contractual relationship is not, therefore, a characteristic of the act of 1904 which distinguishes it from the railroad grants. By filing its release of all claims under any grant of land in aid of the construction of a railroad, the Santa Fe Company relinquished its contractual right to the selected land in exchange for the benefits of the Transportation Act. It cannot escape the consequences of such action.

The motion for rehearing is denied.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

* * * * * *

In United States District Court

Motion to dismiss

Filed July 12, 1944

The defendants move the court to dismiss the action because the complaint fails to state a cause of action upon which relief can be granted.

Dated July 11, 1944.

FOWLER HARPER,
Solicitor,
Department of the Interior,
HARRY M. EDELSTEIN,
Assistant Solicitor,
Department of the Interior,
Attorneys for Defendants.

* * * * * *

In United States District Court

Memorandum opinion

Filed Dec. 4, 1944

These are motions to dismiss, which were argued together. They raise similar questions of law and can be conveniently consolidated for decision.

Plaintiff prays in each case for a judgment enjoining defendants from rejecting selections of lands filed by it on the ground that they are barred by a release filed pursuant to Sec. 321 (b) of the Transportation Act of 1940, 49 U. S. C. 65, and directing defendants to determine the rights of plaintiff in said selections, without regard to the release.

In Civil Action 2373 the facts alleged are briefly as follows: *Plaintiff's predecessor* in title acquired certain lands in New Mexico under the Act of July 27, 1866, 14 Stat. 292.[1]

By deed dated December 18, 1911, plaintiff relinquished these lands to the United States under the Act of April 28, 1904, 33 Stat. 556.[2] On August 28, 1940, it exercised its rights of selection under the Statute last named, by selecting lands in lieu of the relinquished lands, and on December 18, 1940, while the selections were still pending, filed the release above mentioned.

In Civil Action 2384[5] the facts alleged are briefly as follows:

Plaintiff's predecessor in title acquired certain lands in Arizona under the Act of July 27, 1886, supra. By deed dated November 27, 1916, and December 15, 1916, plaintiff relinquished these lands to the United States under the Act of June 22, 1874, 18 Stat. 194; 43 U. S. C. 888.[3] On March 23, 1943,

[1] "SEC. 3. And be it further enacted, that there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office. * * *"

[2] "That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior."

[3] "That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the preemption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes. And provided further, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a preemption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market."

plaintiff exercised its rights of selection under the Statute last named, by selecting lands in lieu of the relinquished lands. On December 18, 1940, plaintiff filed the release above mentioned.

The release filed by plaintiff pursuant to the Transportation Act of 1940, supra, stated that it

relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

The Transportation Act of 1940, supra, in paragraph (a) of Section 321 thereof, makes certain concessions to carriers in the rates, fares, and charges applicable to the transportation of persons, property, and mail for the United States, and paragraph (b) thereof provides that,

If any carrier by railroad furnishing such transportation,
22 or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) f this section had not been enacted until such such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid.

The issue therefore is whether the release embraces, and thereby extinguishes, the right to select lands in lieu of relinquished lands under the Acts of 1904 and 1874, supra, respectively.

The release embraces any and all claims of whatever description to lands and interests therein granted by any Act of Congress to plaintiff or any predecessor in aid of the construction of any portion of its railroad.[4] Plaintiff's right to select lieu lands is a claim to lands, and this is not disputed. Plaintiff does contend, however, that it is not a claim to lands granted by any Act of Congress in aid of construction: that is, that the Acts of 1904

[4] The release excludes lands which have been patented or certified to plaintiff or any predecessor in aid of construction, and other categories of lands not material to this case.

and 1874, supra, are not granting acts in aid of construction, and therefore that such claim is not included in the release.

The Act of 1866, supra, under which plaintiff's predecessor acquired title to the lands relinquished, is concededly a granting act in aid of construction.[3] The Acts of 1904 and 1874, supra, are supplemental to, and in legal effect amendatory of, the
23 Act of 1866, supra. They made provision for the relief of settlers who were found to be occupying the lands of the railroad company. They gave the railroad company the right to select equal quantities of lands in lieu of lands which they relinquished for the benefit of such settlers. They were measures found to be desirable by reason of unforeseen developments arising out of the operation of the railroad land grant acts. The plaintiff itself probably was not without selfish motive in the relinquishment of its lands, which tended to prevent an exodus of established settlers along its right of way who without conscious fault found themselves without title.

As I perceive the intent of Congress, from the language of the statutes themselves, the lieu lands, when selected, were to be, so far as humanly possible, a counterpart of, and in substitution for, the original lands granted, and were to be lands granted by Congress in aid of construction, precisely as were the original lands. The Act of 1904, supra, gives the right to select public lands "of equal quality" and contemplates a substitution of section for section. The Act of 1874, supra, gives the right to select "an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they [railroad grantees] shall receive title the same as though originally granted."

The three Acts are each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads. The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, supra, and provide for grants contingent upon the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, supra, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, supra.

The fact, as contended by plaintiff, that it gave a consideration, namely, a deed to the lands relinquished, for the
24 right to select others, does not make either of the Acts

[3] Santa Fe Pac. R. R. Co. v. Work, 267 U. S. 511, 69 L. ed. 764.

any less a grant. A railroad land grant is not a gift, but is a transfer of title to lands in return for the construction and operation of a railroad.[6] Nor, as urged by plaintiff, does the fact that plaintiff's rights are contractual [7] remove the applicable statutes from the category of granting statutes.[8]

Under these circumstances, I am of the opinion that these unperfected rights of plaintiff to select lieu lands are claims to lands granted by Acts of Congress to plaintiff in aid of the construction of its railroad, and are therefore within the scope of, and extinguished by, the release, which was given in pursuance of an apparent Congressional purpose to wipe the slate clean of such claims by any railroad who enjoyed the benefits of the rate concessions made by the Transportation Act of 1940.

The motion to dismiss will therefore be granted. Counsel will prepare and submit on notice order in accordance herewith.

DAVID A. PINE, *Justice.*

DECEMBER 4, 1944.

25

In United States District Court

Final judgment

Filed Dec. 12, 1944

This cause came on to be heard on defendants' motion to dismiss on the ground that the complaint fails to state a cause of action upon which relief can be granted.

It is this 12th day of December 1944, ordered that the motion be and the same is hereby granted and the complaint be and the same is hereby dismissed on the merits.

DAVID A. PINE, *Justice.*

No objection to form.

LAWRENCE CAKE,
Attorney for Plaintiff.

[6] Burke v. Sou. Pac. R. R. Co., 234 U. S. 669, 680.
[7] Santa Fe Pac. R. R. Co. v. Fall, 259 U. S. 197. U. S. ex rel Santa Fe Pac. R. R. Co. v. Work, 55 U. S. App. D. C. 206, 4 F. 2d 172.
[8] Burke v. Southern Pac. R. R. Co., supra. United States v. Northern Pac. Ry. Co., 256 U. S. 51 (1921). Southern Pac. Co. v. United States, 307 U. S. 393, 396 (1939).

27 In the United States Court of Appeals, District of Columbia

No. 8957

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, OSCAR L. CHAPMAN, FRED W. JOHNSON, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Joint appendix

In United States District Court

Complaint for injunction and relief in the nature of mandamus.

Filed April 13, 1944

1. Plaintiff, Santa Fe Pacific Railroad Company, is a corporation created and organized under the Act of March 3, 1897, c. 374, 29 Stat. 622, and sues in its own right and as lawful
28 successor to the Atlantic and Pacific Railroad Company, a corporation created and organized under the Act of July 27, 1866, c. 278, 14 Stat. 292.

2. The defendants are residents of the District of Columbia, the defendant Harold L. Ickes being Secretary of the Interior and as such charged by law with the administration of the laws of the United States relating to public lands, the defendant Oscar L. Chapman being Assistant Secretary of the Interior and charged with like duties under the direction of the Secretary and in particular with the supervision of the General Land Office, and the defendant Fred W. Johnson being Commissioner of the General Land Office and charged by law with the administration of that office under the supervision and direction of the Secretary and Assistant Secretary of the Interior. The said defendants are sued individually and in view and because of acts done or threatened by them under color of their offices and authority.

3. The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $3,000, and involves the construction of certain laws of the United States under which plaintiff claims vested rights in and to certain public lands, and the duties of the

defendants, respectively, to determine plaintiff's rights in and to the lands in question and plaintiff's right to a patent to the said lands, upon a proper construction of the laws under which plaintiff's rights are claimed, and without regard to a certain release executed by plaintiff and filed with the defendant the Secretary of the Interior, as hereinafter more particularly stated.

4. Plaintiff, Santa Fe Pacific Railroad Company, is successor to the Atlantic and Pacific Railroad Company and to the land grant to the latter company under the Act of July 27, 1866, c. 278, 14 Stat. 292, and is fully vested with all the rights of the Atlantic and Pacific Railroad Company under the said Act of July 27, 1866, in and to the lands thereby granted.

5. Included in the lands so granted, and acquired and owned by plaintiff as successor to the Atlantic and Pacific
29 Railroad Company, prior to November 27, 1916, were the following described lands in Arizona, to wit:

NE¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
NW¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
SE¼NE¼, sec. 13, T. 15 N., R. 13 W., G. & S. R. M.
NE¼SW¼, sec. 27, T. 16½ N., R. 13 W., G. & S. R. M.
SE¼SW¼, sec. 27, T. 16½ N., R. 13 W., G. & S. R. M.
SE¼SE¼, sec. 11, T. 15 N., R. 13 W., G. & S. R. M.

being lands within the primary limits of the said grant, title to which vested in plaintiff's predecessor, the Atlantic and Pacific Railroad Company, as of March 12, 1872, upon the definite location of the said railroad.

6. April 29, 1916, by letters of that date, designated Phoenix 019940 and Phoenix 024256, and December 5, 1916, by letter of that date designated Phoenix 019426–026935, the Commissioner of the General Land Office requested plaintiff to relinquish to the United States, under the Act of June 22, 1874, 18 Stat. 194, among other lands, the said lands described in paragraph 5, supra.

7. Thereafter, by deeds of relinquishment dated November 27, 1916, and December 15, 1916, plaintiff conveyed and relinquished to the United States, among other lands, the said lands described in paragraph 5 supra.

8. March 2, 1917, and May 25, 1917, by letters of those dates, the Commissioner of the General Land Office accepted the said relinquishments and advised plaintiff that it would be allowed upon proper application to select other lands in lieu of the lands relinquished, in accordance with the rules and regulations under the said Act of June 22, 1874.

9. Thereafter, March 23, 1943, plaintiff exercised the rights of selection, based on the relinquishment of the lands described in

paragraph 5 supra, by filing selections under the said Act of June 22, 1874, of the following described lands, to wit:

SE¼SE¼, sec. 10, T. 17 N., R. 9 W., G. & S. R. M.
SW¼SE¼, sec. 10, T. 17 N., R. 9 W., G. & S. R. M.
NW¼NE¼, sec. 15, T. 17 N., R. 9 W., G. & S. R. M.
NE¼NE¼, sec. 15, T. 17 N., R. 9 W., G. & S. R. M.
NE¼SW¼, sec. 13, T. 17 N., R. 9½ W., G. & S. R. M.
NW¼SE¼, sec. 13, T. 17 N., R. 9½ W., G. & S. R. M.

in lieu of the said lands described in paragraph 5 supra. The said selections were filed in the local land office of the Department of the Interior, at Phoenix, Arizona, in accordance with the regulations of the Department of the Interior, being designated as Phoenix 080805, 080806, 080807, 080808, 080809, and 080810, and in due course were forwarded to the General Land Office for further action.

10. May 15 and May 22, 1943, by decisions of the Commissioner of the General Land Office of those dates, plaintiff was notified that in view of a certain release filed by plaintiff with the Secretary of the Interior, on December 18, 1940, pursuant to section 321 (b), Title III, Part II, of the Transportation Act of 1940, approved September 18, 1940, c. 722, 54 Stat. 954, a copy of which is attached hereto and made part hereof, marked Exhibit A, plaintiff had no further rights under the Act of June 22, 1874, and that the said selections, Phoenix 080805-080810, would be rejected.

11. Thereafter, and within thirty days from the dates of the said decisions of the Commissioner of the General Land Office, in accordance with the regulations and rules of practice of the Department of the Interior, plaintiff appealed to the Secretary of the Interior from the said decisions rejecting the said selections.

12. January 8, 1944, in two decisions of that date, the defendant Oscar L. Chapman, as Assistant Secretary of the Interior, acting for the defendant the Secretary of the Interior, affirmed the decisions of the Commissioner of the General Land Office rejecting the said selections.

13. January 18, 1944, plaintiff filed with the Secretary of the Interior a motion for rehearing. February 8, 1944, plaintiff's motion for rehearing was denied by the defendant the Assistant Secretary of the Interior.

14. Plaintiff avers that its right under the Act of June 22, 1874, to select other lands, in lieu of the lands relin-
31 quished and quitclaimed to the United States as hereinabove stated, was and is a contractual right derived from the said Act of June 22, 1874, and the relinquishment of the base

lands above described; that plaintiff has fully performed its obligation under the said contract; that the lands so relinquished to the United States have not been designated or used as base for any other selections; that plaintiff is entitled to the lands selected subject to the approval of the Secretary of the Interior upon a determination that the said lands are "public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection" within the terms of the said Act of June 22, 1874; that the release described in paragraph 10 supra does not apply to and does not include rights of selection under the said Act of June 22, 1874, because it is a release of claims to lands, or interests therein, granted to plaintiff or its predecessor in interest in aid of the construction of any portion of its railroad, whereas plaintiff's rights under the said Act of June 22, 1874, are of a different character and not derived from any grant to plaintiff or its predecessor; that in rejecting the selections on the ground that approval thereof is barred by the said release the defendants have acted on an erroneous construction of the law and have gone beyond the authority and powers conferred upon them by law and have arbitrarily disregarded and departed from their duty to approve the said selections if found to be otherwise valid and in accord with the law and regulations.

15. Plaintiff further avers that the action of the defendants in rejecting the said selections on the ground stated and in denying plaintiff's right to a patent to the lands selected is in violation of plaintiff's vested rights in and to the said lands and casts a cloud on plaintiff's title and right thereto; that plaintiff has exhausted all remedies, by appeal or otherwise, in the Department of the Interior, and that its only remaining remedy is by application to this court for a decree enjoining the defendants from re-
32 jecting the said selections on the ground stated, and directing the defendants to determine plaintiff's right to the approval of the said selections without regard to the release filed by plaintiff pursuant to section 321 (b) of the Transportation Act of 1940; that unless such relief is granted plaintiff will be wholly denied and deprived of its rights under the said Act of June 22, 1874, in violation of the law and of the terms of the said contract, and will suffer loss and injury for which it has no other remedy whatever.

Wherefore, the premises considered, plaintiff prays:

1. For a temporary restraining order or injunction, pendente lite, and upon final hearing a decree, enjoining the defendants from rejecting the said selections filed by plaintiff under the Act of June 22, 1874, on the ground that they are barred and all rights of the plaintiff therein extinguished by the release filed pursuant to section 321 (b) of the Transportation Act of 1940; and directing

the defendants to determine the rights of the plaintiff in the said selections and to the lands selected, without regard to the said release.

2. For such other and further relief as the case may require and may be necessary and appropriate.

SANTA FE PACIFIC RAILROAD COMPANY,
By LAWRENCE CAKE, *Attorney.*

DISTRICT OF COLUMBIA:

I, Lawrence Cake, being duly sworn depose and say, that I am the attorney for Santa Fe Pacific Railroad Company, a corporation, that I have read the foregoing complaint, and that I verily believe the facts therein stated to be true.

LAWRENCE CAKE.

33 Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 6th day of March, 1944.

[SEAL] ALMA B. NEWELL, *Notary Public.*

LAWRENCE CAKE,
717 National Press Building, Washington, D. C.,
Attorney for Plaintiff.

* * * * *

Defendants' Exhibit 1

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY.
Washington, January 8, 1944.

A. 23679.

SANTE FE PACIFIC RAILROAD COMPANY:

"F"

Phoenix 080809, 080810.

Applications for land in lieu of railroad land grant rejected. Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of May 15, 1943, rejecting application, Phoenix 080809, for selection of the NE¼SW¼ Sec. 13, T. 17 N., R. 9½ W., G. & S. R. B. & M., Arizona, in lieu of the SE¼SW¼ Sec. 27, T. 16½ N., R. 43 W., G. & S. R. B. & M., Arizona, and Phoenix 080810, for the NW¼SE¼ Sec. 13, T. 17 N., R. 9½ W., G. & S. R. B. & M., Ari-

zona, in lieu of the SE¼SE¼ Sec. 11, T. 15 N., R. 13 W., G. & S. R. B. & M., Arizona.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the con-
34 struction of its railroad in the act of July 27, 1866 (14 Stat. 292). The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at a foreclosure sale and Congress confirmed the grant of July 27, 1866, to the Santa Fe Company by act of March 3, 1897 (29 Stat. 622). On January 15, 1917, the Santa Fe Company, acting pursuant to the act of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), relinquished to the United States certain portions of this grant then occupied by settlers whose entries had already been allowed. The relinquishment was accepted and on March 2, 1917, the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select other land within the limits of the grant in lieu of the land relinquished (Miscellaneous No. 67356). This land was then unsurveyed and remained so until about 1939. The official plat of the official survey was accepted by the General Land Office on May 21, 1940.

On December 18, 1940, in accordance with section 321 (b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations issued thereunder by the Secretary of the Interior (43 C. F. R. 273.61–273.67), the Santa Fe Company and The Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company

"* * * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad * * *."

Each release stated that it did not embrace

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in
35 selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

The releases were approved March 1, 1941.

On March 23, 1943, the Santa Fe Company filed its selection of the two 40-acre tracts in Sec. 13, T. 17 N., R. 9 W., G. & S. R. B.

& M., claiming the right to select this land in lieu of the land relinquished in 1917, in behalf of the Greene Cattle Company, Incorporated, its transferee, under the provision of the saving clause of section 321 (b) of the Transportation Act of 1940, which permits patenting of lands sold to innocent purchasers for value. It also filed a petition for classification of this land as suitable for stock-watering development under section 7 of the Taylor Grazing act. The Commissioner of the General Land Office rejected the selection on the grounds that the right of selection had been relinquished in the release of December 18, 1940; that a sale to an innocent purchaser had not been shown; and that the selected land had been withdrawn by Executive order of April 17, 1926, creating Public Water Reserve No. 107.

The Santa Fe Pacific Railroad Company has appealed, alleging that its unexercised selection right was not impaired by the release filed on December 18, 1940, for the reason that the release covered only claims under a land grant. It argues that its claim to the selected land does not arise from a land grant and, consequently, was not included in the release; that its unexercised selection right was not included in the release for the further reason that it had been sold to an innocent purchaser for value prior to the effectiveness of the Transportation Act of September 18, 1940; and that its transferee has equities in certain springs of water located on the selected land which entitle the selection to favorable consideration.

36 The act of June 22, 1874, was enacted for the purpose of relieving the hardships of settlers whose filing or entry on public lands had been allowed by the General Land Office under the pre-emption or homestead laws subsequent to the time when the rights of a railroad company under a congressional grant attached to the granted land. It was required because the time when the rights of the grantees in the railroad land grants became vested was often uncertain and ascertained only with difficulty. The granting acts protected settlers whose rights attached prior to those of the grantee and permitted the grantee to replace such losses by selection from the indemnity limits of the grant. The act of June 22, 1874, permitted the grantee to relinquish land in possession of settlers whose rights arose subsequent to its own and to select an equal quantity of land within the limits of the grant not otherwise appropriated in lieu of such land, and provided that the grantee should receive title to land thus selected the same as if it had been originally granted.

The act of August 29, 1890 (26 Stat. 369, 43 U. S. C. sec. 889), gave the grantee railroad companies the same right of selection in cases wherein settlers had resided upon and improved land granted to a railroad company for a period of five years, but whose filings

or entries were not of record. It has no application in this case for the reason that the entries of the settlers on the 40-acre tracts in Sec. 27, T. 16½ N., R. 13 W., and Sec. 11, T. 15 N., R. 13 W., were both of record and were patented in 1914 (Phoenix 019940 and 024256).

It is apparent that the act of June 22, 1874, contemplates a grant of land to a railroad company antedating the passage of this act. The act gives the grantee an option to relinquish a portion of land included in the earlier grant to which its rights had attached, but which was in the possession of settlers. Harris v. Northern Pacific R. R. Co., 10 L. D. 264; Southern Pacific Railroad Company, 33 L. D. 89. If the option to relinquish is exercised,
37 the grantee may then select other land, in lieu of the land relinquished within either the primary or the indemnity limits of the original grant. Southern Pacific R. R. Co., 18 L. D. 275; The Gulf and Ship Island R. R. Co. v. The United States, 22 L. D. 560; Dressel v. Oregon and California R. R. Co., 35 L. D. 21. It is true that the selected land contemplated by this act is land which was not granted to the railroad company in the original grant, but the act of June 22, 1874, is in itself a granting act from which arises the right to the land selected in lieu of land included in the original grant. The act specifically provides that railroad companies which exercise the option to select land in lieu of land relinquished pursuant to this act, "shall receive title" to the selected land "the same as though originally granted." This is a declaration of an additional grant in lieu of a portion of the original grant.

Further, it creates a right of the same dignity as the indemnity provisions of the granting acts. It has never been denied that claims to indemnity land arise out of the provision of the original grant which gives the grantee a contingent right to such land by permitting it to select land within the indemnity limits of the grant to replace losses of land specifically granted. The act of June 22, 1874, gives the grantee of the original grant a right to select land within either the primary limits or the indemnity limits of the grant in lieu of losses within the primary limits which are not covered by the indemnity provisions of the original grant. The act of June 22, 1874, is, therefore, but an extension of the indemnity right previously given. The land is referred to as lieu land rather than indemnity land for the purpose of emphasizing the distinction in the occasion for exercise of the right of selection, but the act creating this right is as truly a granting act as the original act.

It is not material that the act of June 22, 1874, may have created a contract right to select land in lieu of land relinquished.
38 The Supreme Court has held that all of the railroad land

grants constituted offers to convey title to public lands to certain railroad companies who would build railroad lines, which ripened into contracts when the railroads indicated their acceptance of the offers by filing plats of the lines which they proposed to build. Under these circumstances, the existence of a contract right to select lands in lieu of land relinquished does not prove that the act under which the contract right is claimed does not constitute a grant. It suggests rather that the purpose and result accomplished by this act are the same as the purposes and results of the original granting acts.

We conclude, therefore, that the act of June 22, 1874, is a granting act and that the right to select, which the Santa Fe Company now seeks to exercise is a claim arising under that act. The release of December 18, 1940, covers any and all claims arising under "any act of Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely the original grant of July 27, 1866. It follows that all claims arising under the grant of 1874 were relinquished by this release.

If, as appellant contends, the right to select land in lieu of land relinquished which was bestowed by the act of June 22, 1874, is not a right which arises out of a railroad land grant and is not covered by a release filed pursuant to the Transportation Act of 1940, it is clear that it cannot be excepted from the operation of such release by the saving clauses of section 321 (b) of the Transportation Act. Appellant is somewhat inconsistent in relying upon both contentions, but inasmuch as the Department has determined that the right of selection does arise under a railroad land grant and was therefore necessarily included in the release of December 18, 1940, it will consider whether or not it was excepted from the release under the second provision of the saving clause of section 321 (b) of the Transportation Act, which provides:

"* * * Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier [the grantee] to an innocent purchaser for value * * *"

Appellant has recognized that the saving clause of section 321 (b) does not operate automatically without any designation of land to be excepted from a release, by filing with its release in the General Land Office a list of lands and the purchasers to whom it alleged that it had sold them prior to the effectiveness of the Transportation Act. This list did not include the land in the present selection list. Further, it did not submit with its selection list proof that the Greene Cattle Company, Incorporated, is a purchaser entitled to the estate in land claimed in the selection list which was filed instead of an application for patent. The regula-

tions of December 10, 1941 (43 C. F. R. 273.68–273.74), require that such proof shall be submitted with an application for patent. Appellant's claim that its right to select should be recogized under the saving clause of section 321 (b) rests upon the mere assertion that the Greene Cattle Company, Incorporated, is a transferee of this right. This is insufficient to clothe it with the rights of an innocent purchaser under the Transportation Act.

In any event, the bona fide purchaser provision of the Transportation Act is not applicable to the transfer of a railroad company's unexercised right to select land. Santa Fe Pacific Railroad Company, A. 23646, decided today.

In view of the fact that the record shows both a relinquishment of the right sought to be exercised, in the release filed on December 18, 1940, and failure to bring the claim within the saving clause of the Transportation Act, a determination that the Greene Cattle Company, Incorporated, has equities in certain springs of water located on the land sought to be selected cannot affect the decision in this case. Accordingly, we do not examine that question.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

40 *Defendants' exhibit 2*

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, January 8, 1944.

A. 23684.

SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Phoenix 080805, 080806, 080807, 080808.
Lieu indemnity selection rejected.
Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On December 18, 1940, the Santa Fe Pacific Railroad Company, successor in interest to the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat. 292), and the Atchison, Topeka and Santa Fe Railroad Company, operator of the line of railroad, filed in the General Land Office releases of all claims to lands under said grant in accordance with section 321 (b), Part II, Title III of the Transportation Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations of October 10, 1940 (43 C. F. R. 273.61–273.67). The text of said section 321 (b) is as follows:

"If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States
41 to land, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

The release filed by the Santa Fe Pacific Railroad Company, relinquished, remised and quitclaimed to the United States:

"* * * any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."

It excepted from the release only:

"* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

42 On March 23, 1943, John H. Page and Company by authority of the Santa Fe Pacific Railroad Company filed lieu indemnity selections under the acts of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), and August 29, 1890 (26 Stat. 369, 43 U. S. C.

sec. 889), Phoenix 080805 to 080808, inclusive, accompanied by petitions to classify the lands selected under section 7 of the Taylor Grazing Act. The affidavits supporting the petition for classification stated that the beneficiary under the selection is the Greene Cattle Company, Incorporated, and in a letter of John H. Page and Company to the register it is stated that "These selection rights were purchased from Santa Fe Pacific Railroad Company many years ago."

The Commissioner of the General Land Office by decision of May 22, 1943, rejected the selections on the ground that the right to make them had been released by the Santa Fe Pacific Railroad Company. The Commissioner stated:

"Other than the statement of John H. Page and Company in their letter to the Register, supra, that these selection rights were purchased from the railroad company many years ago, there is with the record no evidence of a sale. The exception in section 321b profects certain sales of lands to innocent purchasers for value. It does not protect a sale of mere rights of selection, at the most in the nature of floats, not attached to any tracts and which may never be exercised, the filing of a selection being presumably at the option of the purchaser. As no land was sold, these transactions do not come within the protection of this exception.

"The theory back of the filing of selections 080805 to 080808, inclusive, may be that the railroad company's rights under the acts of 1874 and 1890 were not in fact released. The releases, in conformity with the Transportation Act and the regulations, are broad and include all rights and claims pursuant to, growing out of, or arising from the grants except the three types of claims specifically excluded therefrom, above-mentioned, relative to patented, clear listed, and sold lands. All outstanding unused selection rights under these acts were released. Such rights may not now be asserted as a basis for the acquisition of public lands."

John H. Page and Company, as agents for the selector, have appealed. Under various forms of statement their contention is that the outstanding unused selection rights under the acts of 1874 and 1890 which had been sold by the Santa Fe Pacific Railroad Company prior to September 18, 1940, to innocent purchasers for value, were not owned or claimed by said company and were not released by the company but are protected by the exception in section 321 (b) of the Transportation Act.

The appeal is supported by an affidavit executed by John H. Page, senior partner of the firm of John H. Page and Company, which, among other things, states that the said firm in September 1932 purchased from Hugo Seaberg, of Raton, New Mexico "for

a valuable consideration the selection rights of the Santa Fe Pacific Railroad Company under the acts of 1874 and 1890, as follows:" Then follows a description of the base land offered in exchange for the land selected in the above-mentioned applications. It is further stated, in substance, that Seaberg requested W. B. Collinson, Land Commissioner of Santa Fe Pacific Railroad Company, to record John H. Page and Company "as owners of the above rights;" that the applications to select were signed by Collinson, the Land Commissioner, and that thereafter, he being deceased, the affiant requested E. O. Hemenway, the Land Commissioner of said railroad company, to furnish John H. Page and Company with the new applications to select to take the place of those signed by Collinson, and new applications were signed by Hemenway and forwarded to John H. Page and Company on July 27, 1937, and these applications are the ones used in support of the applications Phoenix 080805-080808.

In the showings of appellant as to its transactions relating to the selections with Page and Company, no sale of the
44 right of selection to them is discerned. If the application to select had been made by Page and Company as an assignee or transferee of the railroad grantee, it would have been under the rules and practice of the Department forthwith rejected. The Department does not undertake to determine whether an applicant for selection other than the railroad grantee is a successor in interest to the land grant rights, and in the absence of legislation or judicial recognition of such applicant as a successor in interest patents under the grant are issued to the grantee company. Southern Pacific Land Company, 42 L. D. 522. And in the administration of such grants the Department always deals with the grantee itself and not with parties claiming to be in privity with it, as the granting act does not confer on it jurisdiction to determine the relations between the grantee company and private individuals. Perrin v. Santa Fe Pacific Railroad Company, 43 L. D. 467.

The most that can be said from the nature of the showings is that the Santa Fe Pacific Railroad Company for a valuable consideration promised to exercise its right of selection at the instance and for the benefit of Page and Company as to such lands as the latter might designate, and upon the perfection of the selection or upon issuance of patent to the grantee to convey the land to Page and Company or to whom the contract had been assigned. But regardless of whether the selection right is assignable and the transaction here alleged may be considered as such an assignment, it is obvious the railroad company could not assign any more right than was conferred upon it by law.

As said in Southern Pacific Railroad Company, 53 L. D. 211, 213, "The Supreme Court has repeatedly held in substance that the

granting acts conferred no rights to specific tracts within the indemnity limits until the grantee's right of selection had been exercised." In Clark v. Herington, 186 U. S. 206, 209, the court said:

"* * * and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that
45 up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in Kansas Pacific Railroad v. Atchison Railroad, 142 U. S. 414, 421: 'Until selection was made the title remained in the government, subject to its disposal at its pleasure.' See, also, Ryan v. Railroad Company, 99 U. S. 382; Grinnel v. Railroad Company, 103 U. S. 739; Cedar Rapids &c. Railroad v. Herring, 110 U. S. 27; St. Paul Railroad v. Winona Railroad, 112 U. S. 720, 731; Barney v. Winona &c. Railroad, 117 U. S. 228, 232; Sioux City Railroad v. Chicago Railway, 117 U. S. 406, 408; Wisconsin Railroad v. Price County, 133 U. S. 496, 511; United States v. Missouri &c. Railway, 141 U. S. 358, 375; Hewitt v. Schultz, 180 U. S. 139; Southern Pacific Railroad Company v. Bell, 183 U. S 675."

In Ryan v. Railroad Company, 99 U. S. 382, 388, the court in speaking of the land there in contest held that "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose * * *" Later cases recognizing this doctrine have described the right of selection of indemnity lands as a power, and held that no color of title is gained until the power is exercised. United States v. Southern Pacific Railroad Company, 223 U. S. 565, 579. And the right is dependent upon a future contingency. Northern Pacific Railroad Company v. Lane, 46 App. D. C. 434, 439.

It is manifest that the land sought here to be selected does not fall with the categories of section 321 (b) of patented or certified land or of lands listed or selected and finally and fully approved, but it is in effect contended that they are in the class of "such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value."

It is not questioned that the right of selection is a valuable property right, such a right as might be sold or encumbered (Myers v. Croft, 13 Wall. 291), as has been frequently done by grantee
46 companies and would entitle the assignee to the indemnity lands within the grant, when title thereto is perfected under the grant. Hastings and Dakota Ry. Co., 18 L. D. 511-518. The contract, however, to sell the lands intended to be acquired was entirely executory. The assignor had under the rulings above cited no right, interest or claim to any specific land, and therefore, could not convey any interest in them. The Secretary could not

rightly find that the agreement of the railroad company to exercise its right of selection to lands thereafter to be specified was a sale of lands to a bona fide purchaser within the meaning of the statute. The railroad company elected to surrender its rights of selection by releasing the land in conformity with the provisions of the transportation act, and, therefore, relinquished its power to select the lands in question. See Santa Fe Pacific Railroad Company, A. 23646, decided this day.

The decision of the Commissioner is affirmed.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

Defendants' Exhibit 3

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, February 8, 1944.

A. 23679.
A. 23684.
SANTA FE PACIFIC RAILROAD COMPANY:
"F"
Phoenix 080805, 080806, 080807, 080808, 080809, 080810.
Applications for selection of lieu lands rejected.
Motion denied.

MOTION FOR REHEARING

* * * * *

On January 8, 1944, the Department affirmed the decisions of the Commissioner of the General Land Office, re-
47 jecting the Santa Fe Pacific Railroad Company's applications to select certain tracts of land in Arizona in lieu of an equal quantity of land acquired under the grant of July 27, 1866, which it had relinquished to the United States pursuant to the act of June 22, 1874. The Company has filed motions for rehearing, contending that the departmental decisions are based on a misconception of its rights under the act and that they deprive it of vested rights which are distinct and apart from the claims released under the Transportation Act of 1940. This contention is attempted to be supported by the argument that the act of 1874 is not a granting act and that claims arising from it were not relinquished by the Company's release of all claims to any grant of land, to itself or any predecessor in interest, in aid of the construction of a railroad.

The departmental decision of January 8, 1944 (A. 23679), pointed out that because the act of June 22, 1874, provides for a

substitution of land to be selected from the land not specifically granted but within the limits of the grant of July 27, 1866, for land which was specifically granted by that act in aid of the construction of a railroad, and subsequently relinquished by the voluntary act of the railroad company, it is a granting act. Appellant has offered nothing which in any way lends support to its reiterated contention that the act of June 1874 is not a granting act. In Santa Fe Pacific R. Co. v. Work, 267 U. S. 511 and Santa Fe Pacific R. Co. v. Work, 54 App. D. C. 161, the court held merely that a definition of minerals in the original grant of July 27, 1866, which excluded coal and iron, could not be applied to the act of June 22, 1874. The courts thus recognized that the act of 1874 is separate and distinct from the grant of 1866 and that it affords a method of acquiring title to public land upon different terms. It is significant that in the excerpt from the decision of the Court of Appeals quoted in appellant's brief, the court refers to the grant of 1866 as "the original grant." Obviously, if there were
48 no other grant, it would be inappropriate to speak of an "original" grant. It is apparent, therefore, that the decisions upon which appellant relies do not support its theory.

Appellant's further contention that the act of 1874 created a contract relationship between itself and the United States is immaterial. Under the theory of the railroad land grants announced by the Supreme Court in Burke v. Southern Pacific R. R. Co., 234 U. S. 669, and reiterated in numerous decisions, the act of 1874 constituted an offer to convey to the railroad a quantity of land equal to the quantity of land previously granted to it which it should relinquish to the United States for the benefit of settlers. A contract resulted when appellant filed its relinquishment to certain tracts of granted land and the United States became bound to convey an equal quantity of land. But appellant had no title to any land and could acquire none until it had perfected its inchoate right by selecting specific sections of land. Having filed its selections, appellant was undoubtedly entitled to receive patent to all of the selected land which was then available for disposition. But by filing its release before the selection was approved, it divested itself of all claims to such land except such as were included in the exceptions recognized in the saving clause of section 321 (b) of the Transportation Act of 1940. The saving clause recognizes only such selections as have been fully and finally approved by the Secretary. Hence, the contractual relationship between the United States and appellant did not prevent appellant from voluntarily relinquishing its right to receive patent to the land which it had selected in exchange for the benefits of the Transportation Act. The plain terms of the statute defining the

nature of the releases which the railroad companies were permitted to file, clearly includes the claim appellant now asserts and appellant was charged with notice of that fact. Appellant
49 was not required to file such release, but it chose to do so in order to receive the benefits of the Transportation Act. It cannot now escape the consequences of such action.

The motion for rehearing is denied.

(Sgd.) OSCAR L. CHAPMAN,
Assistant Secretary.

In United States District Court

Motion to dismiss

Filed July 12, 1944

The defendants move the court to dismiss the action because the complaint fails to state a cause of action upon which relief can be granted.

FOWLER HARPER,
Solicitor,
Department of the Interior,
HARRY M. EDELSTEIN,
Assistant Solicitor,
Department of the Interior,
Attorneys for Defendants.

Dated July 11, 1944.

In United States District Court

Final judgment

Filed Dec. 12, 1944

This cause came on to be heard on defendants' motion to dismiss on the ground that the complaint fails to state a cause of action upon which relief can be granted.

It is this 12th day of December 1944, ordered that the motion be and the same is hereby granted and the complaint be and the same is hereby dismissed on the merits.

DAVID A. PINE, *Justice.*

No objection to form.

LAWRENCE CAKE,
Attorney for Plaintiff.

51 In United States Court of Appeals, District of Columbia

No. 8956, October Term, 1945

No. 8957, October Term, 1945

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

vs.

HAROLD L. ICKES ET AL., APPELLEES

Minute entry

Nov. 13, 1945

On motion of Mr. Harry M. Edelstein, Mr. Ernest F. Hom of the Bar of the Supreme Court of California was allowed to argue for Appellee Harold L. Ickes pro hac vice by special leave of Court.

Argument commenced by Mr. Lawrence Cake, attorney for appellant, concluded by Ernest F. Hom, attorney for appellees.

* * * * *

53 In United States Court of Appeals, District of Columbia

No. 8956-7

SANTA FE PACIFIC RAILROAD COMPANY, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR; OSCAR L. CHAPMAN, ASSISTANT SECRETARY OF THE INTERIOR; FRED W. JOHNSON, COMMISSIONER OF THE GENERAL LAND OFFICE, APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued November 13, 1945—Decided February 4, 1946

Mr. Lawrence Cake for appellant.

Mr. Ernest F. Hom, Principal Attorney, Office of the Solicitor, Department of Interior, of the Bar of the Supreme Court of California, pro hac vice, by special leave of Court, with whom Mr. Harry Edelstein, Assistant Solicitor and Mr. Sidney B. Jacoby, Senior Attorney, Department of Interior, were on the brief, for appellees.

Before GRONER, C. J., CLARK and PRETTYMAN, JJ.

Opinion

CLARK, J.: The Santa Fe Pacific Railroad Company brought two actions in the District Court requesting relief by way of injunction and mandamus to compel the Secretary of the Interior to determine the Railroad's right to certain lands selected in accordance with Acts of 1874[1] and 1904[2], without regard to the release executed by the Santa Fe under Title III, Part II, § 321 of the Transportation Act of 1940.[3] The District Court dismissed both complaints on the merits.[4]

54 The Santa Fe's predecessor in interest, the Atlantic and Pacific Railroad Company, had received lands under an "aid of construction" granting act enacted in 1866.[5] Section 3 of that Act provided for the basic grants to Santa Fe's predecessor, and gave the railroad the right to select indemnity lands where lands within the primary limits of the grant "shall have been granted, sold, reserved, occupied by homestead settler, or preempted, or otherwise disposed of * * *", as well as the right to select agricultural lands in substitution for reserved mineral lands within the original grants. No rights involving these "indemnity" lands are in controversy here. However, it later developed that subsequent to the time when the railroad's rights attached to particular lands under the 1866 Act some of the original grants came into the possession of settlers whose entry or filing was allowed under the preemption or homestead laws. The United States, desiring to confirm title to such lands in the homesteaders, passed Acts in 1874 and 1904 permitting the railroad, when requested to do so by the Secretary of the Interior, to reconvey to the government land, as to which title had vested in the railroad, thus making it possible for the government to perfect title in the later claimants.[6] In consideration for the reconveyances under these Acts the railroad gained the right to select "lieu" lands to replace those given up. The controversy here

[1] Act of June 22, 1874, c. 409, 18 Stat. 194.

[2] Act of April 28, 1904, c. 1819, 33 Stat. 556.

[3] Act of September 18, 1940, ch. 722, 54 Stat. 954; Section 321 (b) reading in part: "If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier as aforesaid * * *."

[4] 57 F. Supp. 984. The question in the two cases is the same. In one, No. 8957, the 1874 Act is in issue and in the other the 1904 Act.

[5] Act of July 27, 1866, c. 278, 14 Stat. 292.

[6] The major difference between the two Acts is that the one passed in 1874 applied to all railroad land grants while the 1904 Act was applicable only to the Atlantic and Pacific grant in New Mexico.

arose out of the reconveyances by the railroad of lands which enabled the government to perfect title in various homesteaders.

The situation thus created should be distinguished from the right to select "indemnity" lands under Section 3 of the 1866 Act where land covered by the initial grant was found to be already in the rightful possession of others, or otherwise unavailable to the railroad. The later Acts were passed to remedy a situation wherein the railroad's rights were prior in point of time, thus requiring a reconveyance to the United States by the railroad in order that the government might pass good title to subsequent settlers.

In case No. 8957 the Santa Fe in 1916, at the request of the *Secretary of the Interior, reconveyed to the United States certain* lands in accordance with the terms of the 1874 Act, and in 1943 sought to exercise its right of selection accruing as a result of the 1916 relinquishment.

In case No. 8956 the Santa Fe in 1911 again, upon a similar request, reconveyed lands under the provisions of the 1904 Act and in August of 1940 it applied to select lands in replacement for those given up at the government's request under that Act. While its request was pending, the railroad in December 1940 filed with the Secretary of Interior a release under the Transportation Act of 1940 of "any and all claims of what ever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interest granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."[1]

55 The Commissioner of the General Land Office and the Secretary of the Interior thereafter rejected both of appellant's applications to select "lieu" lands on the grounds that the release under the 1940 Act covered the claims in question and that they could not be asserted after the filing and acceptance of the release.

The release was filed to enable the railroad to enjoy the full applicable commercial rates on certain types of government traffic which had previously been transported at "land-grant" rates, and the Santa Fe concedes that it was effective to wipe out any claims it may have had to indemnity lands as provided for in the original granting Act of 1866, and admittedly as a result of the release the Santa Fe actually surrendered and gave up claims to hundreds of

[1] In accordance with the terms of the statute there were excepted from the release, "* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company. * * *"

thousands of acres of land which it would otherwise have been entitled to demand be patented to it.

However, in bringing these appeals the Santa Fe seeks to establish that, contrary to the District Court holding, the 1874 and 1904 Acts are to be regarded as separate pieces of legislation, conferring on the railroad under the circumstances shown to exist here, a positive right to select lands to replace those reconveyed. Santa Fe maintains that its rights arising under the later acts are not claims for lands granted "in aid of construction" and hence not covered or contemplated by the 1940 Act and the release filed under it.

Shortly stated, the railroad's position here is that the Acts of 1874 and 1904 are not amendments of the Act of 1866, nor Acts granting land in aid of construction, but were enacted to enable the United States to recover title to lands then the property of the railroad in consideration for which it offered a *quid pro quo* in the form of exchange of other lands belonging to the United States.

The lower court has held that the three enactments, i. e., the 1866, 1874 and 1904 Acts, are but parts of a single legislative scheme. Further, it concluded that the 1940 Act, in relation to the granting acts, was intended "* * * to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the concessions made by the Transportation Act of 1940." Santa Fe Pac. R. Co. v. Ickes, 57 F. Supp. 984, 986–7. If we were to accept the position taken by the government and sustained by the lower court to the effect that the 1874 and 1904 Acts are but amendatory of the 1866 Act we would be constrained to hold that the railroad gave up all of its claims under these acts when it filed its release under the 1940 Act. However, we have carefully examined the three "granting acts" in issue in the light of § 321 of the Transportation Act of 1940, and, for reasons which follow, cannot accept the conclusion reached by the District Court.

In interpreting the 1940 Act the Secretary of Interior, judging from the form in which the release was drawn, then considered it applicable only to claims for lands "granted in aid of construction." But the government in its brief suggests a wider significance to the quoted words than we think can be implied.*

56 With this latter interpretation we do not agree. Furthermore, it is perfectly apparent from the language of the release itself that the construction of the 1940 statute now contended for by the Secretary is, as we have seen, at variance with that put upon the same statute by the selfsame Secretary of the

* After quoting from the 1940 Act the government's brief, footnote 7, pg. 11, case No. 8956, sets forth: "In other words, the releases to be filed by the land grant railroads were not limited in their application to any particular grants or to any type of claims arising under the grants, but were to apply to any claim to land under any grant."

Interior when performing his statutory duty of prescribing its terms in conformity with the statute.

Though the legislative history of this particular statute is of little aid on this point, it seems hardly reasonable that Congress should have intended to have the release required under the 1940 Act apply to any claims other than those for lands granted in aid of construction. Otherwise, it is conceivable that the railroads would be required to relinquish land claims which might in no way be related to the lands granted as construction inducements.[9]

Having thus limited the application of the release under the 1940 Act, we proceed to an appraisal of the respective positions of the parties. There is of course no question but that the 1866 Act provided for grants "in aid of construction." Santa Fe Pac. R. R. Co. v. Work, 267 U. S. 511. The rights accruing to the railroad under such a grant are contractual; the railroad receiving the land in return for building and operating a line. Burke v. Southern Pac. R. R. Co., 234 U. S. 669, 680. Further, it will be agreed that the road's rights stemming from the later exchange acts are likewise contractual by nature. Santa Fe Pacific R. R. Co. v. Fall, 259 U. S. 197. It is from this foundation that the government argues that the right to make selections under the 1874 and 1904 Acts is essentially the same as the right to make selections of indemnity lands under the 1866 Act. Hence, it is urged that the release under the Act of 1940 wipes out the railroad's claims under all three pieces of legislation. The railroad counters with the proposition that these are separate statutes enacted for clearly different primary purposes and thus ought not to be read as one in relation to the 1940 Act.

We perceive substantial reasons for endorsing the point of view advanced by the railroad insofar as it denies that the 1874 and 1904 Acts are to be interpreted as "grants in aid of construction." We may concede, for the purposes of this opinion, that the acts here in issue are "granting" acts, and also that they create contractual rights in many ways comparable to those arising under the original granting Act of 1866 which was in "aid of construction";

57 however, it does not necessarily follow, as the government

[9] For a recent Congressional expression on the matter of the Federal Government's policy regarding the recapture of lands vested in the railroads under various granting acts see: House Report No. 393, 79th Congress, 1st Session, March 26, 1945. (H. R. 694) pg. 12, "* * * It has been suggested that as a condition to the surrender by the Government of its right to these land-grant deductions the land-grant railroads should be required to reconvey to the United States any of the granted lands still held by them. Aside from the fact that, as previously stated herein, the Government has already been more than fully reimbursed for the lands granted by it, this suggestion has been shown by the testimony to be neither equitable nor practicable. * * *

"A large portion of the remaining land-grant lands are held by roads such as the Union Pacific and Central Pacific whose grants contained no requirement for reduced charges on Government traffic. As to the theory on which those roads should be required to give up such lands the committee has heard no suggestion. * * *

"Also among the land-grant roads themselves will be found many which have little or no granted lands remaining to them. The burden of such a condition would thus fall most unevenly even upon the land-grant lines."

contends, that the road's claims under the later acts are all properly identifiable with the 1866 Act.

In support of this view we observe that: (1) The lands released pursuant to the 1874 and 1904 Acts had for all practical purposes vested in the railroad.[10] The railroad's rights were not, therefore, at the time of release, to be classed as mere naked claims, as was the case with regard to "indemnity" rights provided for in the 1866 Act. (2) While the lands reconveyed had been acquired as grants in "aid of construction," the railroad was under no compulsion to release them, and it did so only because of a new promise by the government which guaranteed replacement lands. This transaction cannot be rightly termed ancillary to or amendatory of the original grant. It was not the receiving of a grant in "aid of construction"; the construction phase was long since passed. It was a new bargain, entered into for a new consideration and for a different purpose.[11]

Our decision rests on what we regard as the distinctly separate character of the contractual obligations. Under the 1866 Act the government granted land as an incentive to build. Under the 1874 and 1904 Acts the government granted land in exchange for that which it wished others to have free from any possible claims of the railroads, which admittedly had good title. To say that because the lands relinquished were granted "in aid of construction" other land claims accepted in place and stead of the relinquished lands are to be regarded as subject to the terms of the original grant is, we think, to ignore the succeeding transactions and vitiate contractual rights arising wholly independently of the original Act. We do ont believe that such was the intention of Congress.

Viewed from a slightly different perspective, it will be seen that the government could not have reached the lands relinquished under the 1874 and 1904 Acts had the railroad refused to reconvey—as it had the unquestioned right to do. This was specifically admitted by the Solicitor for appellees in the oral argument in response to a direct question from the court. Admittedly also the lands given up by reconveyance would not have been returned to the government by the release under the 1940 Act. But the government now contends that the voluntary giving up of the once vested lands under the provisions of the 1874 and 1904 Acts, throws the railroad's claims back unto the same footing as those for "indem-

[10] The fact that title had vested was not disputed by appellees either in their brief or oral argument, and we do not regard it necessary to discuss here the mechanics incident to the issuance of patents confirming title to such lands.

[11] This difference in purpose is well illustrated by the following language from Santa Fe v. Work, 267 U. S. 511, 516: "The Act of 1874 was passed to help homestead and other settlers who were in hard case because they established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. This Act of 1874 was intended to induce the railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits."

nity" lands which had never been selected under the 1866 Act. The dignity of the railroad's rights is thus depreciated by its agreeing to do business with the government at the government's request under the later acts. We cannot agree that such result was in contemplation when the 1874 and 1904 Acts were passed.

58 In our view the rights acquired through relinquishment of vested interests stand equal in strength to the actual holding of the initial grants. In other words, the selection rights accruing from the subsequent transactions are equivalent to the rights in the lands given up and are not, and were not intended to be, effected by the 1940 Act. This, we conceive to be a much sounder approach than that urged by the government which would require us to consider all transactions as a part of one inseparable contractual arrangement whereby the strength of the railroad's claims must be judged by the terms of the 1866 Act.

Even regarding the Acts of 1866, 1874 and 1904 as a part of the same "legislative scheme" does not preclude the result we have reached. Unquestionably the acts are by their character related to the same general problem of adjusting railroad land claims, but this does not foreclose the possibility of separate rights being established as they were by reason of independent transactions in accordance with the respective provisions of the different statutes. The inherent relationship of the acts does not require that we regard them all as "grants in aid of construction," or a reading forward or backward into the others, the terms of any one of them. Further, we do not find this to be a case where the court is bound on any theory to accept the latest statutory interpretation applied by the administrative officer.[12]

In reaching the decision that the Railroad is entitled to have its selections under the 1874 and 1904 Acts reviewed without reference to the 1940 Act release, we have been most mindful of the policy considerations behind the respective pieces of legislation. We believe that neither policy nor precedent is offended by the decision we have reached but rather, that the result will more clearly define and establish the respective interests involved in accordance with the intent of the Congress. Reversed.

Judge Groner is of opinion that the applicable section of the Transportation Act of 1940 is broad enough to cover the lands in dispute, and accordingly is for affirming the judgments of the District Court.

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[12] Cf. Ickes v. Underwood, 78 U. S. App. D. C. 396, 144 F. (2d) 546; and United States ex rel Jordan v. Ickes, 79 U. S. App. D. C. 114, 143 F. (2d) 152; cited in the government's brief.

59 In United States Court of Appeals for the District of Columbia

Nos. 8956; 8957—January Term, 1946

SANTA FE PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLANT

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

Appeals from the District Court of the United States for the District of Columbia

Before GRONER, C. J., and CLARK, and PRETTYMAN, J. J.

United States Court of Appeals for the District of Columbia. Filed Feb. 4, 1946. Joseph W. Stewart, Clerk.

Judgment

These causes came on to be heard on the transcripts of the records from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby, reversed, and that these causes be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

PER Mr. Justice CLARK.

Dated February 4, 1946.

Dissenting opinion by Mr. Chief Justice GRONER.

60 United States Court of Appeals for the District of Columbia

No. 8956-7—April Term, 1946

[Title omitted.]

Order substituting party appellee

Filed April 6, 1946

On consideration of appellant's motions to substitute Julius A. Krug, present Secretary of the Interior, as party appellee herein in the place and stead of Harold L. Ickes, resigned, and appellant having alleged that there is substantial need for continuing and maintaining these appeals and obtaining an adjudication of the questions involved, and it appearing that Julius A. Krug consents to these motions to substitute,

It is ordered by the Court that Julius A. Krug, Secretary of the Interior be, and he is hereby, substituted as party appellee herein in the place and stead of Harold L. Ickes.

PER CURIAM.

Dated April 6, 1946.
[File endorsement omitted.]

61 In the United States Court of Appeals for the District of Columbia

No. 8956

[Title omitted.]
[File endorsement omitted.]

Designation of record

Filed April 18, 1946.

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. Order substituting Julius A. Krug as appellee in place of Harold L. Ickes;
6. This designation;
7. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in
62 his office, which will be returned to him when the case has been disposed of by the Supreme Court.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

(S) Roger P. Marquis,
ROGER P. MARQUIS,
Attorney, Department of Justice.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 18th day of April 1946.

(S) Lawrence Cake,
LAWRENCE CAKE,
Attorney for Appellant.

[Clerk's certificate to foregoing transcript omitted in printing.]

63 In the United States Court of Appeals for the District of Columbia

No. 8957

[Title omitted.]

Designation of record

The Clerk will please prepare and certify a transcript of record on petition for a writ of certiorari to the Supreme Court of the United States in the above-entitled case, including therein the following:

1. The Joint Appendix to the briefs of the parties in this case;
2. Minute entry of argument;
3. Opinion of this Court;
4. Judgment;
5. Order substituting Julius A. Krug as appellee in place of Harold L. Ickes;
6. The designation;
7. Clerk's certificate.

The Clerk is also requested to send to the Clerk of the United States Supreme Court the original record now on file in his office, which will be returned to him when the case has been disposed of by the Supreme Court.

J. Howard McGrath.
J. Howard McGrath,
Solicitor General.
Roger P. Marquis,
Roger P. Marquis,
Attorney, Department of Justice.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 18th day of April 1946.

Lawrence Cake,
Lawrence Cake,
Attorney for Appellant.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

65 In the Supreme Court of the United States

[Title omitted.]

Stipulation as to consolidation, etc.

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-captioned cases that:

1. Because the above-captioned cases involve common questions of law and fact, a consolidation will avoid expense and delay, and said cases were heard together and a single opinion was written by the Court of Appeals for the District of Columbia, said cases may be consolidated for hearing and decision on the petition for a writ of certiorari, and, if certiorari is granted, for hearing and decision of the said cases on the merits.

2. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining these cases on the merits, the printed record shall consist of the following:

66 a. Joint Appendix to the briefs of the parties in these cases.

b. The proceedings had before the United States Court of Appeals for the District of Columbia.

3. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties hereto may refer in their briefs and argument to said transcript of record, including that part which has not been printed as the Joint Appendix.

April 18, 1946.

J. HOWARD MCGRATH,
Solicitor General,
Attorney for Petitioners.

April 18, 1946.

LAWRENCE CAKE,
Attorney for Respondent.

67 Supreme Court of the United States

No. 97—October Term, 1946

Order allowing certiorari

Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

68 Supreme Court of the United States

No. 98—October Term, 1946

Order allowing certiorari

Filed June 10, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

MAY 3 1946

97 98

Nos. ~~1192, 1193~~

In the Supreme Court of the United States

OCTOBER TERM, 1945

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, OSCAR L. CHAPMAN, UNDER SECRETARY OF THE INTERIOR, AND FRED W. JOHNSON, COMMISSIONER OF THE GENERAL LAND OFFICE, PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1945

NOS. 1192, 1193

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, OSCAR L. CHAPMAN, UNDER SECRETARY OF THE INTERIOR, AND FRED W. JOHNSON, COMMISSIONER OF THE GENERAL LAND OFFICE, PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments entered in these cases on February 4, 1946, by the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the district court (R. 19–24) is reported in 57 F. Supp. 984. The opinion of the Court of Appeals (R. 53–58) is reported in 153 F. 2d 305.

JURISDICTION

The judgments of the Court of Appeals were entered on February 4, 1946 (R. 59). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A release of "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress * * * in aid of the construction of any portion of its railroad" was given by a railroad company, as required by the Transportation Act of 1940, as a condition precedent to charging the United States full commercial rates for transportation. The questions presented are:

1. Whether, despite such release, the railroad is entitled to select lands under the Acts of 1874 and 1904, which gave the railroad the right to select lands in lieu of lands previously granted for the purpose of aiding construction of the railroad but which had been occupied by settlers after the railroad's rights attached, the railroad having relinquished and reconveyed the occupied lands to the United States as required by the statutes.

2. Whether relief in the nature of mandamus

or mandatory injunction may be granted to overrule the Interior Department's view that the release barred such claims when there is no finding that this view reflects a misapprehension of the Department's plain ministerial duty.

STATUTES INVOLVED

The relevant portions of the Act of July 27, 1866, c. 278, 14 Stat. 292, the Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, the Act of April 28, 1904, c. 1810, 33 Stat. 556, and the Transportation Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, are set out in the Appendix, *infra*, pp. 15–20.

STATEMENT

The judgments sought to be reviewed reversed judgments of the district court dismissing, upon motion, suits brought to obtain relief in the nature of mandamus or injunction against the Secretary of the Interior, the Assistant Secretary of the Interior and the Commissioner of the General Land Office. The facts, as alleged in the complaints, may be summarized as follows:

In 1866, lands were granted to the Atlantic and Pacific Railroad Company for the purpose of aiding the construction of the railroad. Act of July 27, 1866, c. 278, 14 Stat. 292. The Santa Fe Pacific Railroad Company, hereinafter referred to as the "Railroad", is the successor to the Atlantic and Pacific Railroad Company (R. 1, 27). Upon

definite location of the Railroad, the rights to certain lands vested pursuant to the Act of 1866 (R. 3, 29). The Act of June 22, 1874, provided that if lands granted to the railroads were found to be in the possession of a settler whose entry or filing had been allowed under the preemption or homestead laws subsequent to the time when, by decision of the Land Office, the right of the Railroad was declared to have attached to the lands, the Railroad, upon a relinquishment of such lands, should be entitled to select an equal quantity of other lands in lieu thereof from public lands "to which they [the Railroad] shall receive title the same as though originally granted." Similarly, the Act of April 28, 1904, provided for the relinquishment of any section of lands in the Territory of New Mexico when any portion of the section had been occupied by settlers and gave to the Atlantic and Pacific Railroad Company the right to select other sections in lieu thereof. In December 1911, the Railroad relinquished and reconveyed certain lands to the United States under the Act of 1904, and, in 1916, lands in Arizona were similarly relinquished and reconveyed under the Act of 1874 (R. 3–4, 29–30).

On August 28, 1940, the Railroad filed its application to select other land in lieu of that which had been relinquished under the 1904 Act (R. 4). A similar application was filed on March 23, 1943, for lands relinquished under the 1874 Act (R. 29–

30). On September 18, 1940, the Transportation Act of 1940 became law. It provides for payment by the United States of the full commercial rates for transportation. Section 321 (b) of the Act provides, in part, as follows:

> If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid.

On December 18, 1940, the Railroad filed a release as provided for in the Act (R. 5, 8, 30).

In May and June of 1943, the Commissioner of the General Land Office rejected the Railroad's applications for selections on the ground that the

rights under the 1874 and 1904 Acts had been relinquished by the release filed pursuant to the Transportation Act (R. 5, 30). Appeals were taken, resulting in affirmance by the Assistant Secretary of the Interior of the decision of the General Land Office in three decisions of January 8, 1944 (R. 5, 10–16, 30, 33–46).

After motions for rehearing had been denied (R. 5, 17–19, 30, 46–49), the Railroad filed complaints in the instant cases. After alleging the facts as above outlined, the complaints sought relief by way of injunction and mandamus to compel the Secretary of the Interior and other Department officials to determine the Railroad's right to the lands without regard to the release under the Transportation Act (R. 7, 32). The defendants' motions to dismiss were sustained in both cases and the complaints were dismissed (R. 25, 49).

Upon appeal to the Court of Appeals for the District of Columbia, the decision of the district court was reversed on the ground that the release filed under the Transportation Act did not embrace these claims (R. 53–58). Judge Groner took the contrary view that the 1940 Act was broad enough to cover the lands in dispute (R. 58).

REASONS FOR GRANTING THE WRIT

1. The Railroad has taken advantage of the right, accorded it by the Transportation Act of 1940, to exact full commercial rates from the Gov-

ernment and has filed the release of claims required under that Act. This suit is, we think, an attempt to avoid that release, and the ruling of the court below has approved such avoidance.

The holding of the court below that the claims asserted by the Railroad are not affected by the release executed pursuant to the 1940 Act is based upon its view that the lands to which claim is made, unlike indemnity lands provided for in the 1866 granting act itself (R. 56–57), are not "to aid in the construction of any part of the railroad" within the meaning of the first sentence of Section 321 (b) of the Act.[1] But the claims asserted here are for lands in substitution for lands that had been granted in aid of construction of the railroad but had been reconveyed to the United States because of their occupation by settlers. As the court below recognized, the Acts of 1866, 1874, and 1904 "are by their character related to the same general problem of adjusting railroad land claims" (R. 58). Taking into account the singleness of purpose of these Acts,

[1] The alleged variance in administrative construction, to which the court below referred (R. 55–56), arose from a footnote in the petitioners' briefs below in which it was pointed out that the 1940 Act did not limit the claims required to be released to claims under grants "in aid of construction of the railroad." However, the form of release provided for by regulation (43 Code Fed. Regs. Cum. Supp. sec. 273.64) embraced claims to lands granted, etc., to the railroad "in aid of the construction of any portion of its railroad," and the release here involved so provided (R. 8).

the Department of the Interior has taken the view that the 1874 Act created a right of the same nature as the indemnity provisions of the granting act which gave the grantee the right to select lands in lieu of lands specifically granted but which were lost because of pre-existing rights in others (R. 14, 37). It has concluded that the 1874 Act and the 1904 Act were simply extensions of the indemnity right given in the 1866 Act. Adopting this approach, the district court likewise concluded that the three acts "are each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads" (R. 23).

In reaching its conclusion that these claims had not been released, the court below placed emphasis on the fact that the lands released under the 1874 and 1904 Acts had, for practical purposes, vested in the railroad. But these lands had been reconveyed and relinquished to the United States in 1911 and 1916. The railroad simply had a claim to select other lands in substitution of those released.[2] The fact that the claims here asserted arose out of the relinquishment of rights to lands previously vested, does not serve to ex-

[2] The instances where, at the time of the release, rights to particular lands had vested in the railroad and where there had been a sale to an innocent purchaser for value are provided for in the last sentence of the 1940 Act. No issue is here presented as to whether the claims are within the saving clause of the 1940 Act and the release, since such issue was not raised by the complaints (R. 6-7, 31-32).

clude such claims from the release. Neither the statute nor the release makes any distinction based on the origin of the claim. Nor does the legislative history of the 1940 Act justify such a limitation.[8]

The court below also emphasized the fact that the railroad was under no compulsion to relinquish the lands and did so only in consideration of the guarantee of replacement lands. But if our view of the statute is the correct one, the Railroad, through the release filed by it, has agreed to accept the right to collect full commercial rates from the Government instead of replacement lands. Moreover, the fact that consideration was given does not make either the 1874 or 1904 Act any less a grant (R. 56). Nor does it justify ignoring the fact that the lands were granted for the purpose of aiding the construction of the road just as much as were the original

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[8] The conference committee summarized this section of the Act as follows (86 Cong. Rec. 10,174):

"Section 321 of part II of title III of the House amendment provided that the full applicable commercial rates, fares, or charges should be paid to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States, or on its behalf, but this provision was conditioned on the release by the carrier of claims against the United States to lands, interest in lands, compensation or reimbursements on account of lands, or interests in lands which have been granted, claimed to have been granted, or which it was claimed should have been granted to such carrier, under any grant from the United States."

lands. The 1874 Act refers to "the adjustment of all railroad land grants" and provides that as to the substitute land, the railroad "shall receive title the same as though originally granted." And the 1904 Act specifically refers to the 1866 Granting Act.[4] Clearly, these claims to substitute lands flow from the grant in aid of construction and, we submit, should be given the same effect as if these rights had been provided for in the 1866 Act. It is, of course, true that if the railroad had not reconveyed the lands under the 1874 and 1904 Acts there would have been no question of application of the release (cf. R. 57). But, since the railroad had voluntarily chosen many years ago to reconvey and thereby exercise its privilege to substitute a claim to select other lands for the lands relinquished, there is no warrant for the conclusion that its rights were of greater dignity than simply a claim to select lands.

The interpretation of the court below means that the release is effective only as to claims arising under the 1866 Act. But the language of the 1940 Act and the release supports the contrary construction by including claims "to lands, interests in lands, compensation or reimbursement

[4] The 1904 Act gave this particular railroad essentially the same right of selection as the 1874 Act gave to land grant railroads generally. The 1904 Act which permitted substitution of entire sections, was passed because the railroad was unwilling to relinquish 160-acre tracts. H. Rep. No. 1203, 58th Cong., 2d sess.; 38 Cong. Rec. 2900.

on account of lands." Since claims for compensation or reimbursement are included, it is immaterial that, at the time of the adoption of the 1874 and 1904 Acts, the construction of the road had been completed. The purpose of these Acts was to aid completion of the process of granting the lands, as provided in the 1866 Act, while the object of the 1940 Act was to compel release of claims and thereby finally conclude the process. The claims were, we submit, included within the release given pursuant to the Transportation Act of 1940.

2. The officials of the Interior Department did not have a plain ministerial duty to ignore the Transportation Act of 1940 and the release given by the Railroad pursuant to that Act. It is apparent from the opinion of the Court of Appeals that the construction given to the statutes by the Interior Department and by the district court was not untenable or unreasonable. The opinion states, "We perceive substantial reasons for endorsing the point of view of the railroad" which was referred to as a "much sounder approach" (R. 56, 58). The conclusion is that "neither policy nor precedent is offended" by the holding which "will more clearly define and establish the respective interests involved" (R. 58). The construction of the administrative officials was, we submit, permissible and the court below has not held otherwise. Thus, the Court of

Appeals has simply expressed its preference for one of two possible constructions of the statutes. But it is well settled that relief by way of injunction in the nature of mandamus will be granted against administrative officials only when their duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command. *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Wilbur* v. *United States*, 281 U. S. 206, 218–219; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577. This rule applies with equal force to the construction of statutes by officials administering those statutes as it does to their factual determinations (*Hall* v. *Payne*, 254 U. S. 343; *Work* v. *Rives*, 267 U. S. 175, 177–178; *Ness* v. *Fisher*, 223 U. S. 683; *Decatur* v. *Paulding*, 14 Pet. 497, 515), and is of special weight in cases involving the disposition of public lands by the Secretary of the Interior. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324, *et seq.* In *Hall* v. *Payne*, *supra*, at pp. 347–348, this Court stated "From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases * * *. He [the Secretary] could not administer or apply the act without construing it, and its construction involved the

exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it." In the instant case, the officials of the Department of the Interior had the power, indeed the duty, to construe the 1940 Act and the earlier legislation. Thus, the Railroad was here entitled to relief only if it could show that the construction given to the statutes was "arbitrary and capricious" or "clearly erroneous." No such showing having been made, the complaints should have been dismissed.

The court below has asserted authority, not to prevent arbitrary action, but to subject reasonable actions of administrative officers to judicial review. Its decision, therefore, is in conflict with this Court's decision in *Hall* v. *Payne*, 254 U. S. 343, and the other decisions cited above.

3. The questions here presented are important. The 1874 Act is generally applicable to all railroad land grants and there are other similar statutes.[5] The decision below puts in jeopardy the right of the United States to vast amounts of public lands; a file check by the Interior Department has revealed that, under the 1874 statute alone (Appendix, *infra*, pp. 16–17), 55,993.21 acres of public land may be made the subject of claims by railroads

[5] Act of July 1, 1898, c. 546, 30 Stat. 597, 620; Act of March 2, 1899, c. 377, 30 Stat. 993; Act of August 5, 1892, c. 382, 27 Stat. 390.

if the decision of the court below is to stand.[6] This is the first case determining the effect to be given to releases under the Transportation Act of 1940. It is likely, therefore, that other claims of a similar nature will be asserted by land grant railroads.

Moreover, whether a court, in a suit for mandatory relief, can compel an administrative agency to adopt the judicial interpretation of a statute even though the administrative view is not unreasonable, is a question of even more general importance. Unless the decision below is reviewed by this Court, it will constitute a precedent applicable in all such proceedings, whether against officials of the Interior Department or other Government officers. And since such litigation is generally centered in the courts of the District of Columbia, it is particularly in the public interest that this case be reviewed.

CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

MAY 1946.

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[6] This figure does not include possible claims by the Northern Pacific Railroad, since it is not unlikely that that road will choose to exercise its rights under the Act of July 1, 1898, 30 Stat. 597, 620, passed for its special benefit.

APPENDIX

The relevant portions of the Act of July 27, 1866, c. 278, 14 Stat. 292, provide as follows:

An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.

* * * * *

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, re-

served, occupied by said homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

* * * * *

The Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, provides in part as follows:

An act for the relief of settlers on railroad lands,

* * * That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided,* That nothing herein contained shall be in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further,* That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local

land-office of the withdrawal of such lands from market.

The Act of April 28, 1904, c. 1810, 33 Stat. 556 reads as follows:

> *An Act for the relief of small-holding settlers within the limits of the grant of land to the Atlantic and Pacific Railroad Company in the Territory of New Mexico.*
>
> * * * * That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

The Transportation Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, provides as follows:

> Sec. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or

charges shall be paid for the transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner pre-

scribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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OCT 21 1946

Nos. 97, 98

In the Supreme Court of the United States

OCTOBER TERM, 1946

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 97

JULIUS A. KRUG, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SANTA FE PACIFIC RAILROAD COMPANY

No. 98

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v.

SANTA FE PACIFIC RAILROAD COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court (R. 14–18) is reported at 57 F. Supp. 984. The opinion of the Court of Appeals (R. 37–42) is reported at 153 F. 2d 305.

JURISDICTION

The judgments of the Court of Appeals were entered on February 4, 1946 (R. 43). The petition for writs of certiorari was filed on May 3, 1946, and granted on June 10, 1946 (R. 47). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A release of "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress * * * in aid of the construction of any portion of its railroad" was given by a railroad company, as required by the Transportation Act of 1940, as a condition precedent to charging the United States full commercial rates for transportation. The questions presented are:

1. Whether, despite such release, the railroad is entitled to select lands under the Acts of 1874 and 1904, which gave the railroad the right to select lands in lieu of lands previously granted for the purpose of aiding construction of the railroad but which had been occupied by settlers after the railroad's rights attached, the railroad having relinquished and reconveyed the occupied lands to the United States as required by the statutes.

2. Whether relief in the nature of mandamus or mandatory injunction may be granted to overturn the view of the Secretary of the Interior that the release barred such claims when there is no finding that this view reflects a misapprehension of the Secretary's plain ministerial duty.

STATUTES INVOLVED

The relevant portions of the Act of July 27, 1866, c. 278, 14 Stat. 292, the Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, the Act of April 28, 1904, c. 1810, 33 Stat. 556, the Transportation Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, and the Administrative Procedure Act, Public No. 404, 79th Cong., 2d sess., are set out in the Appendix, *infra*, pp. 56–64.

STATEMENT

The judgments sought to be reviewed reversed judgments of the district court dismissing, upon motion, suits brought to enjoin the Secretary of the Interior, the Assistant Secretary of the Interior, and the Commissioner of the General Land Office,[1] from rejecting selections of land filed by respondent on the ground that they are barred by a release under Sec. 321 (b) of the

[1] The petitioner Krug was duly substituted for his predecessor in office against whom the suit was originally brought (R. 43–44). The petitioner Chapman, formerly Assistant Secretary, was similarly substituted in his present capacity of Under Secretary. Journal, U. S. Sup. Ct., Oct. T. 1945,

Transportation Act of 1940, and, by way of mandamus, to compel them to determine respondent's rights in the selections without regard to the release. The facts may be summarized as follows:

By the Act of July 27, 1866, c. 278, 14 Stat. 292, *infra*, pp. 56–57, Congress made a grant of lands in New Mexico and Arizona to the Atlantic and Pacific Railroad Company in aid of the construction of a railroad of that name. The Santa Fe Pacific Railroad Company, hereinafter referred to as the "Railroad", is the successor to the Atlantic and Pacific Railroad Company (R. 1, 19); its rights in the grant were specifically confirmed by the Act of March 3, 1897, c. 374, 29 Stat. 622.

Section 3 of the 1866 Act provided for the basic grants to the Railroad's predecessor and gave it the right to select indemnity lands where lands within the primary limits of the grant were occupied by homestead settlers or otherwise disposed of at the time of the designation of the line of the road. By Section 4 of the Act, title to the lands granted vested *pro tanto* upon the completion of

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p. 271 (Nos. 1192 and 1193). After the writs of certiorari were granted, the General Land Office was abolished, and its functions together with that of the former Grazing Service were transferred to a new agency, the Bureau of Land Management. Section 403 of Reorganization Plan No. 3 of 1946, 11 F. R. 7876. The petitioner Johnson is now Acting Director of this Bureau. 11 F. R. 7776.

twenty-five mile portions of the road. Subsequent to the time when the railroad's rights attached to particular lands under the 1866 Act, some of the lands came into possession of settlers whose entry or filing had been allowed under the homestead or preemption laws. By the Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, *infra*, pp. 58–59, Congress provided that the Railroad's predecessor, upon a relinquishment of such lands, should be entitled to select in lieu thereof an equal quantity of other lands within the limits of the grant, "to which they [the Railroad] shall receive title the same as though originally granted." Similarly, the Act of April 28, 1904, c. 1810, 33 Stat. 556, *infra*, p. 59, provided for the relinquishment of any section of the granted lands in the Territory of New Mexico when any portion of the section had been occupied by settlers, and gave to the Railroad the right to select other sections in lieu thereof.[3]

In December 1911, the Railroad relinquished and reconveyed certain lands in New Mexico to the United States under the Act of 1904, and in 1916 lands in Arizona were similarly relinquished and reconveyed under the Act of 1874 (R. 2–3, 20–21). On August 28, 1940, the Railroad filed its application to select land in lieu of that which

[3] The reasons for the passage of the 1904 Act, and its relationship to the 1874 Act, are discussed in detail below, pp. 18–22.

had been relinquished under the 1904 Act (R. 3). A similar application was filed on March 23, 1943, for lands relinquished under the 1874 Act (R. 20–21). On September 18, 1940, the Transportation Act of 1940 became law. Paragraph (a) of Section 321 provides for payment by the United States of the full commercial rates for transportation with exceptions not material here. Paragraph (b) thereof provides, in part, that:

> If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid.

Pursuant to that Act, the Railroad filed a release of "any and all claims of whatever description to

lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad" (R. 3–4, 6–7, 21).

In May and June of 1943, the Commissioner of the General Land Office rejected the Railroad's applications for selections on the ground that the rights under the 1874 and 1904 Acts had been relinquished by the release filed pursuant to the Transportation Act (R. 4, 21). Appeals were taken, resulting in affirmance by the Assistant Secretary of the Interior of the decision of the General Land Office in three decisions of January 8, 1944 (R. 4, 7–12, 21, 23–28, 28–33). Motions for rehearing were denied (R. 4, 12–14, 21, 33–35).

The Railroad thereupon brought two actions "for injunction and relief in the nature of mandamus" (R. 1, 19) to compel the Secretary of the Interior, the Assistant Secretary of the Interior, and the Commissioner of the General Land Office to determine the Railroad's right to the lands in question without regard to the release filed under the Transportation Act of 1940 (R. 5, 22). The first action, No. 97 in this Court, involves tracts

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No. 8956 in the Court of Appeals; Civil Action 23373 in the District Court.

in New Mexico claimed under the 1904 Act; the other action, No. 98 here,* concerns lands in Arizona sought by virtue of the 1874 Act. The basic question in each case is the same, and both cases were tried and argued together in the courts below.

The defendants moved in each case to dismiss the complaints on the ground that they failed to state causes of action (R. 14, 35). The district court, being of opinion that the three Acts—1866, 1874, and 1904—were "each a part of the same legislative scheme and purpose to grant lands in aid of construction of railroads", held that in consequence the claims under the 1874 and 1904 Acts were within the scope of the release filed under Section 321 (b) of the Transportation Act (R. 14–18). Accordingly, it granted the motion and dismissed the complaints (R. 18, 35).

On appeal, the court below reversed (R. 37–42). Speaking through Mr. Justice Clark, the majority stated that "we perceive substantial reasons for endorsing the point of view advanced by the railroad insofar as it denies that the 1874 and 1904 Acts are to be interpreted as 'grants in aid of construction' ", and that the railroad's view that "the selection rights ~~[in the lands given up]~~ accruing from the subsequent [illegible] are equivalent to the rights in the lands given up and are not, and were not intended to be, affected by

*No. 8957 in the Court of Appeals; Civil Action 2345 in the District Court.

the 1940 Act" "we conceive to be a much sounder approach than that urged by the government." Mr. Chief Justice Groner, dissenting, voted for affirmance, being "of opinion that the applicable section of the Transportation Act of 1940 is broad enough to cover the lands in dispute" (R. 42).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the release executed by the Railroad in order to take advantage of the concessions of the Transportation Act of 1940 did not embrace its claims to select lands under the Acts of 1874 and 1904.

2. In holding that relief in the nature of mandamus should be granted to compel the Secretary of the Interior and his subordinates, in cases involving public lands of the United States, to reverse their interpretation of statutes relating to such lands, which they are required to administer and interpret, in the absence of a showing that such interpretation is either untenable, unreasonable, or plainly wrong, and where the duty imposed by the statutes is neither plain nor ministerial.

3. In reversing the judgments of the district court.

SUMMARY OF ARGUMENT

The Railroad has taken advantage of the provisions of the Transportation Act of 1940 to exact

full commercial rates from the Government and has filed the release of claims required thereunder. This suit, we believe, is an attempt to avoid that release, which in terms covered claims for compensation on account of lands granted in aid of construction.

I

The Acts of 1866, 1874 and 1904 were all a part of one legislative scheme to make a grant of public lands in aid of construction of the Railroad's line. The original grant of 1866 made provision for indemnity lands where a settler's right had vested before the Railroad's right attached. Where, however, the settler's right was later in time, Congress granted relief under the 1874 Act, by providing for other lands to be granted the Railroad in return for its relinquishing the lands occupied by the settler. The 1904 Act was similarly passed to meet a situation in New Mexico where the Railroad refused to relinquish except by entire sections.

The continuity and integral character of the several Acts are demonstrated by their terms and by the nature of the rights conferred. Under all three statutes, the right to indemnity land was essentially the same. The claims under the 1866 Act are admittedly extinguished by the release. The later Acts implemented and furthered the completion of the grant in aid of construction; the purpose of the Transportation Act of

1940, on the other hand, was to conclude the granting process, and to settle all outstanding claims to land in return for a *quid pro quo*.

The distinctions sought to be made by the court below between the Railroad's claims under the 1866 Act—the original grant—and its claims under the Acts of 1874 and 1904, are untenable; they break down once the claims under the later Acts are analyzed in the light of settled principles of public land law.

Even if the later Acts are held not to be *in pari materia* with the original grant, and not to be considered as grants in aid of construction, they are at the very least grants in substitution for grants in aid of construction, and as such are covered by the release. The claims here were not within any of the exceptions stated in the release which the Railroad executed.

Similarly, the claims are required to be released by the statute in return for the privilege of exacting the higher rates. They do not fall within the exceptions set out in the statute, and neither the terms nor the legislative history of the Transportation Act of 1940 justify excepting the claims here in question from that Act simply because they originated in respect of lands which had once been vested. The ruling below nullifies the statute by permitting the Railroad to have not only the higher rate but the right to receive more lands as well.

II

But regardless of the correctness of the Secretary's view, his decision rejecting the Railroad's claims involved the exercise of judgment and discretion, was reasonable, and has not been shown to be plainly wrong. He was not under a plain, ministerial duty, equivalent to a positive command, to ignore the release in passing on the present claims. That being so, his decision is, under an unbroken line of authorities in this Court, impregnable to mandamus.

The court below did not purport to hold that the Secretary of the Interior was plainly wrong, but simply expressed its own preference for a different construction of the statutes involved. Consequently, on the authority of the cases in this Court—cases not even referred to in the opinion below—the relief sought here, by way of injunction in the nature of mandamus, should not have been granted. In the absence of a determination that the Secretary departed from a plain official duty, and no such determination was even purportedly made, his decision can not be disturbed.

This standard of review is not modified by anything contained in the Administrative Procedure Act. To begin with, its provisions as to judicial review, which became effective over three months after the writs of certiorari were granted herein, are not applicable to pending cases; nothing in

the statute or its legislative history reflects an intent to alter the scope of judicial review where the proceedings in review are already in the ultimate appellate stage.

Moreover, and in any event, both the language and the legislative history of the Administrative Procedure Act show a clear intent to preserve the existing scope of judicial review. The debates are devoid of any suggestion that the rule with reference to the function of mandamus was even under consideration. Strong and apt language would be necessary to overturn a doctrine so firmly settled. The Act evidences no such purpose.

ARGUMENT

The Railroad has taken advantage of the right, accorded it by the Transportation Act of 1940, to exact full commercial rates from the Government,[5] and has filed the release of claims required under that Act. This suit is, we think, an attempt to avoid that release, and the ruling of the court below has approved such avoidance.

[5] Except in respect of "the transportation of military or naval property of the United States moving for military or naval and not for civil use or * * * of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty." Section 321 (a), *infra*, pp. 59–60. For the scope of the first clause of the exception, see *United States* v. *Powell and Anderson, Receivers*, and *United States* v. *Atlantic Coast Line R. Co.*, Nos. 56 and 57, this Term. The entire exception has now been repealed, to take effect on October 1, 1946, by the Act of December 12, 1945, Public No. 256, 79th Cong., 1st sess.

The release here in question (R. 6–7) relinquished

> any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

As we shall show, the claims here in question under the Acts of 1874 and 1904 were for lands in aid of construction. But even on respondent's view, that its selection rights under these Acts were not claims to lands granted in aid of construction (Br. Opp. 2, 3, 7), they were indubitably "claims * * * to * * * *compensation or reimbursement therefor on account of lands* * * * granted * * * in aid of the construction of any portion of its railroad," and so were extinguished by the release. It is significant that so much of the language of the release as is italicized in the preceding sentence is pointedly ignored in respondent's argument (Br. Opp. 4–5). Whatever else they may be, the claims here asserted are obviously for compensation on account of lands granted in aid of construction, lands which had been reconveyed to the United States under the Acts of 1874 and 1904. The

Railroad exchanged its right to those claims in return for a right to collect full commercial rates from the Government.

The Transportation Act of 1940 was enacted at a time when the Railroad had unsatisfied claims under its grant amounting to nearly 1,500,000 acres of land (Br. Opp. 3). Under the provisions of Section 321 of the Act, *infra*, pp. 59–61, Congress offered to relinquish its right to continue to exact lower rates from the Railroad for Government traffic (other than military or naval traffic)[6] if the Railroad in turn would agree to relinquish whatever claims it had to additional public land. The Railroad accepted the offer and executed a release well within the time specified by the Act (R. 6–7). Presumably this document would not have been executed if the Railroad had deemed the bargain disadvantageous. But, advantageous or not, it was a bargain, and the Railroad, which has now had the benefit of full commercial rates during a period of extremely heavy rail traffic, cannot now claim the benefit of what it relinquished as well as the benefit of what it obtained. It cannot keep its claim to land while being freed of land-grant rates. It must abide the trade it made.

The basic error of the court below lay in its failure to give proper effect to the words of the release and to the terms and the obvious intent of

[6] See note 5, *supra*.

the Transportation Act of 1940. It was on this ground that Chief Justice Groner based his dissent. But the court also erred in failing to hold that the 1874 and 1904 Acts were simply extensions of the original 1866 grant, designed to assure the Railroad of its full share of lands granted in aid of construction; and in disregarding the unbroken line of authorities in this Court which hold that a decision of the Secretary of the Interior on a matter within his jurisdiction is not subject to reversal by mandamus or mandatory injunction where, as here, it is neither unreasonable nor plainly wrong.

I. Claims to Lands Granted by the Acts of 1874 and 1904 in Lieu of Lands Granted by the 1866 Act and Thereafter Relinquished Were Extinguished by the Release Here Executed Pursuant to the Transportation Act of 1940

A. THE ACTS OF 1866, 1874, AND 1904 WERE ALL A PART OF ONE LEGISLATIVE SCHEME TO MAKE A GRANT OF PUBLIC LANDS IN AID OF THE CONSTRUCTION OF THE RAILROAD'S LINE

In Section 3 of the original grant to the Railroad's predecessor, *infra*, pp. 56–57, provision was made that, whenever any of the sections granted to the company were found to have been occupied by homestead settlers or otherwise disposed of, prior to the time of definite location of the line, other land within specified indemnity limits could be selected. Provision was likewise made for the selection of agricultural land in place of any land

originally granted that was found to be mineral in character. It is not disputed that such claims to lieu or indemnity lands arise out of the provisions of the original grant (R. 38–39).

That is to say, when the settler's right was prior in time to that of the Railroad, the latter was entitled to indemnity lands as part of the grant in aid of construction. But it was often difficult to ascertain just when the Railroad's right attached. While it was settled, as a matter of law, that the critical time was the date of filing and approval of the map of definite location in the General Land Office,[7] the fact of such filing was not only unknown to the settler but also to the local land officers. See *Southern Pacific R. R. Co.*, 18 L. D. 275, 279. It was to relieve the hardships caused by this state of affairs to settlers whose filing or entry had been mistakenly allowed by the Land Department that the 1874 Act was enacted. As this Court pointed out in *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511, 516,

> The Act of 1874 was passed to help homestead and other settlers who were in hard case because they had established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. The Act of 1874 was intended to induce the

[7] *Van Wyck* v. *Knevals*, 106 U. S. 360, 366–367; *Kansas Pacific Ry. Co.* v. *Dunmeyer*, 113 U. S. 629, 634–635.

> railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits.[8]

The 1874 Act applied to land grant railroads generally; the 1904 Act applied only to the Atlantic and Pacific grant in New Mexico, and was passed to protect settlers in two or three small settlements in Valencia County in that State. As to those tracts, the railroad refused to relinquish 160-acre tracts, as required by the 1874 Act, since to do so would have eliminated the best land from the sections in which these tracts were located, thus leaving the Railroad with the poorer land in irregular fractions. But the company indicated that it would relinquish the whole of any section on which one or more settlers were located if legislation were enacted giving it the right to select a whole section in lieu thereof. See H. Rep. 1203, 58th Cong., 2d sess.; 38 Cong. Rec. 2900–2901. The substantial purpose of the 1904 Act, however, was the same as that of the basic 1874 Act.

The 1874 Act, *infra*, pp. 58–59, in terms provided that the transactions contemplated were to

[8] Compare the Act of August 29, 1890, c. 819, 26 Stat. 369, 43 U. S. C. 889, giving land grant railroads the same right of selection where settlers had resided for a period of five years upon the improved land granted to a railroad company, but whose filings or entries were not of record.

be "in the adjustment of all railroad land grants" and that the grantees were entitled to select "an equal quantity of other lands in lieu" of lands obtained under the original grant, which they might relinquish in the interest of settlers at the request of the Secretary of the Interior; to such selected lands the grantees would "receive title the same as though originally granted."

The 1904 Act permitted the relinquishment of whole sections of land, title to which was derived "through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of such railroad" and entitled the company "to select in lieu thereof" other sections.

The continuity and integral character of the several acts are thus demonstrated by their terms, and, additionally, by the nature of the rights conferred.

The right to make selections pursuant to the Acts of 1874 and 1904 is essentially the same as the right given by Section 3 of the Act of 1866 to select lieu lands to replace losses within the place limits, and to select agricultural lands in lieu of mineral lands excluded from the grant. Such rights of selection under the 1866 Act were contingent upon the existence of losses and were restricted to land within definite limits. Similarly, the right to select under the later acts is contingent upon relinquishment of land previ-

ously granted; and the land subject to selection is restricted, in the case of the 1874 Act, to land within the limits of the original grant, and, in the case of the 1904 Act, to vacant public land within New Mexico. Thus, under all three acts, the right to select is a contingent right, it is to be exercised for the purpose of giving the railroad a full equivalent for the land granted or intended to be granted in aid of construction, and it is confined to designated public land within specified territorial limits.

As the district court well stated (R. 17),

> * * * The subsequent Acts are not independent granting Acts without relation to any other grant, but are clearly dependent upon, and supplemental to, the grant contained in the Act of 1866, supra, and provide for grants contingent upon the relinquishment of lands granted under such Act. In other words, the Acts of 1904 and 1874, supra, are, respectively, granting Acts in aid of construction when coupled, as they must be, with the Act of 1866, supra.

Even the court below recognized that the Acts of 1866, 1874, and 1904 "are by their character related to the same general problem of adjusting railroad land claims" (R. 42).

The Acts of 1874 and 1904 did not increase the aggregate amount of land previously granted, but they conferred the right to acquire land which could not be acquired under the original

grant on the condition that the Railroad relinquish its right to an equal amount of land originally granted. Certainly if the provisions of the 1874 and 1904 Acts had been embodied in the Act of 1866, it could not be contended that the Railroad's present claims are not extinguished by its release. Yet the effect of the 1874 and 1904 Acts is the same as if their provisions had originally been a part of the original granting act. The circumstance that three statutes are involved rather than one, and that as a matter of chronology they are "separate and distinct" pieces of legislation (Br. Opp. 6), is of course irrelevant on the issue of construction. The later acts are simply extensions of the prior right to make lieu selections, for the question of which Act is to apply is one of time, i. e., whether the Railroad's rights vested before or after those of the settlers attached.

The court below held that the transactions contemplated by the 1874 Act "cannot rightly be termed ancillary to or amendatory of the original grant" (R. 41). But this seems clearly wrong, since the only basis for the Railroad's claim under the 1874 Act is the confirmation to it, by the Act of March 3, 1897, c. 374, 29 Stat. 622, of "the same rights, powers, privileges, grants, and franchises" granted by the Act of June 27, 1866, "and by acts amendatory thereof and supplemental thereto." The Railroad has no standing

here at all unless the Act of 1874 be considered as an act amendatory of and supplemental to the original grant in aid of construction. And the 1904 Act, as we have already noted above, p. 19, specifically refers to the 1866 grant to the Atlantic and Pacific Railroad Company as the source of title.

The substitute land is referred to in all three Acts as "lieu" land, and it is evident that the purpose of the two later statutes was to implement and further the completion of the grant in aid of construction first made in 1866.

The process first begun in 1866 came to a close in 1940; the object of the Transportation Act of 1940 was to provide an expeditious method of releasing outstanding claims, and thereby to conclude the granting process. Events occurring just prior to the enactment of the latter statute had demonstrated the complexities of any less summary method of adjusting a railroad land grant.

After the decision of this Court in the *Forest Reserve* case in 1921 (*United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51) had suggested that there might be a deficiency in the Northern Pacific land grant, there followed studies in the Interior and Agriculture Departments which led eventually to the congressional investigation authorized by the Joint Resolution of June 5, 1924, c. 267, 43 Stat. 431. That investigation in turn resulted in

the Act of June 25, 1929, c. 41, 46 Stat. 41. The suit filed pursuant to the Act last cited produced a litigation which was found too cumbersome for normal appellate processes; a special Act was required to bring the controversy here, Act of May 22, 1936, c. 444, 49 Stat. 1369, and a reargument had been ordered before the passage of the Transportation Act of 1940. See *United States* v. *Northern Pac. Ry. Co.*, 310 U. S. 615.[9] Obviously a more summary method of adjustment was necessary,[10] and, equally obviously, no railroad could be expected to relinquish its claims without a *quid pro quo*. Accordingly, Congress in the 1940 Act offered to permit land grant railroads to charge the United States full commercial rates on non-military traffic, on condition that, while retaining land already patented and selections which the Secretary had approved, they give up all claims

> to lands, interests in lands, compensation, or reimbursement on account of lands or

[9] The case was remanded for further proceedings, *United States* v. *Northern Pac. Ry. Co.*, 311 U. S. 317, with many basic issues reserved because of an equal division of opinion in the Court. 311 U. S. at 341-342. Later the case was settled—20 years after the *Forest Reserve* decision. *United States* v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273 (E. D. Wash.).

[10] The debates on the Transportation Act of 1940 show that Congress was aware that the Northern Pacific land grant was still in process of selection and was being litigated. 84 Cong. Rec. 10115-10116, 10120. And see the hearings on antecedent bills, cited *infra*, p. 36, note 13.

> interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier [i. e., land grant railroad] or any such predecessor in interest under any grant to such carrier or such predecessor in interest * * *

When the Railroad executed the release here involved, it accepted the offer; that closed the books on the grant in aid of the construction of the Atlantic and Pacific line. Thereafter the Railroad had no further claims either to lands or to compensation on account of lands. The account was settled.

B. THE DISTINCTIONS SOUGHT TO BE MADE BY THE COURT BELOW BETWEEN THE RAILROAD'S CLAIMS UNDER THE 1866 ACT AND THOSE UNDER THE 1874 AND 1904 ACTS ARE UNTENABLE

The court below, in its attempt to distinguish the Railroad's claims under the 1874 and 1904 Acts from the admittedly released claims under Section 3 of the 1866 Act, pointed out that the United States could not have reached the lands relinquished under the later Acts if the Railroad had refused to reconvey them, and that if reconveyances had not been made under those Acts the lands in fact given up by the reconveyance need not have been returned because of the release. "But," said Mr. Justice Clark (R. 41–42),

> the government now contends that the voluntary giving up of the once vested lands under the provisions of the 1874 and 1904 Acts, throws the railroad's claims back unto the same footing as those for "indemnity" lands which had never been selected under the 1866 Act. The dignity of the railroad's rights is thus depreciated by its agreeing to do business with the government at the government's request under the later acts. We cannot agree that such result was in contemplation when the 1874 and 1904 Acts were passed.
>
> In our view the rights acquired through relinquishment of vested interests stand equal in strength to the actual holding of the initial grants. In other words, the selection rights accruing from the subsequent transactions are equivalent to the rights in the lands given up * * *.

But this ignores the settled rule that the right to indemnity lands under Section 3 of the original grant (i.e., lands granted in lieu of unavailable place lands) stands on an equal footing with the right to the place lands themselves. Neither was inferior in "dignity" to the other. Both were on a parity. As this Court said in *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 236,

> The ultimate obligation of the Government in respect of the indemnity lands is on the same plane as that respecting the lands in place. The only difference is in the mode of identification. Those in place

> are identified by filing the map of definite location, and the indemnity lands by selections made in lieu of losses in the place limits.

And see *United States* v. *Northern Pac. Ry. Co.*, 311 U. S. 317, 329, quoting the foregoing with approval.

Consequently, a claim (as here) for compensation in respect of place lands once vested and later relinquished can be no different from the right to indemnity lands, which was for compensation for place lands that had never vested. Therefore, to say with the court below that the selection rights under the 1874 and 1904 Acts "are equivalent to the rights in the lands given up," and at the same time to say that it is a depreciation of their dignity to put them "back unto the same footing as those for 'indemnity' lands which had never been selected under the 1866 Act," is to urge that five is the equivalent of five and that its dignity is depreciated by throwing it back on the footing of five.

The line of distinction is, not whether the Railroad had at some time prior to the release acquired title and then reconveyed it or not, nor whether its claim is a claim under the 1866 Act or under the later statutes; the test is whether the Railroad had land or merely a claim to land. If it had the land, its title thereto was not affected by the release. If, on the other hand, it had

merely claims "to land, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad" (R. 6), then those claims were extinguished by the release.

It is immaterial that the Railroad's rights had once vested, that it once had the actual lands. When the Railroad reconveyed and relinquished the lands here in question, those in New Mexico in 1911–12 (R. 2–3, 8) and those in Arizona in 1916–17 (R. 20, 24), it exchanged its land for a claim to select other lands. That claim was released in 1940, and the circumstance that it arose out of the relinquishment of rights which had previously vested does not exclude it from the broad terms of the release.

Nor is it material, as the court below seemed to think (R. 41), that the rights conferred by the 1874 and 1904 Acts were contractual in nature. For the same is true as to the basic land grant of 1866. The enactment of a statute granting the odd-numbered sections within a designated distance on either side of a railroad line to be built in the future constitutes an offer which ripens into a contract when the grantee indicates acceptance by filing its map of definite location. *Burke*

v. *Southern Pac. R. R. Co.*, 234 U. S. 669, 680; *United States* v. *Northern Pac. Ry. Co.*, 256 U. S. 51. Legal title to unappropriated lands then vests as of the date of the grant, by relation back. *Northern Lumber Co.* v. *O'Brien*, 204 U. S. 190, 196; *Wisconsin R. R. Co.* v. *Price County*, 133 U. S. 496. The patent subsequently issued is only evidence of title. *Burke* v. *Southern Pac. R. R. Co.*, 234 U. S. 669; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241, 252. The 1874 and 1904 Acts are similarly contracts, see *Santa Fe Pacific R. R. Co.* v. *Fall*, 259 U. S. 197, and are equally granting acts, since they establish a means of identifying particular areas of land owned by the United States, and pledge the United States to transfer its title to identified legal persons who shall meet certain conditions. The circumstance that these acts create only contingent rights does not serve to derogate from their status as granting acts. *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 236; *Payne* v. *New Mexico*, 255 U. S. 367; *West* v. *Ratledge Timber Co.*, 244 U. S. 90.

In short, the attempts of the court below to distinguish the Railroad's rights under the 1874 and 1904 Acts from its claims under the 1866 Act, so as to exclude the former from the release in the face of the concession that the latter cannot be so excluded, break down utterly once the distinctions are tested, as they must be, by the settled principles of the law relating to the public lands.

C. IN ANY EVENT, AND REGARDLESS OF THE STATUS OF THE CLAIMS AS A MATTER OF PUBLIC LAND LAW, THE TERMS OF THE RELEASE AND THE TERMS AND LEGISLATIVE HISTORY OF THE TRANSPORTATION ACT OF 1940 SHOW THAT THESE CLAIMS WERE REQUIRED TO BE EXTINGUISHED IN RETURN FOR THE RAILROAD'S RIGHT TO EXACT FULL COMMERCIAL RATES FROM THE UNITED STATES

It is possible to dispose of the present case on the merits without deciding, as a matter of public land law, whether the Acts of 1874 and 1904 are to be construed *in pari materia* with the original grant of 1866, without ascertaining or defining the precise nature of the rights granted thereby, and without deciding whether and to what extent those rights differ from or are similar to or are identical with other lieu and indemnity rights. For in our view, even if our arguments above, pp. 16–28, should be rejected, the result must still be the same; the Railroad's rights, whatever their nature, were extinguished by its release.

Such a disposition of the present case, i. e., without specifically determining whether the several Acts are *in pari materia*, would follow the precedent of *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511. There the Court held that the Railroad could not select coal lands under the 1874 Act for the reason that, since that Act applied generally to all land grant railroads, the term "mineral" therein should be given its usual mean-

ing rather than the more restricted definition used in the original 1866 grant. The decision proceeded on the broad ground that "not mineral" in the 1874 Act could not be construed to include coal in some cases and to exclude it in others, and was rested also on the circumstance that the construction adopted was in accord with the uniform practice in the Land Department for nearly half a century. 267 U. S. at 516–517. The Court in consequence did not find it necessary to consider whether, as urged by the Railroad in that case, the Act of 1874 was *in pari materia* with the original Act of 1866.[11]

Here, likewise, it is not necessary to determine whether the Acts are *in pari materia*, for even if we concede *arguendo* that the grants made by the 1874 and 1904 Acts were not in aid of construction, they were at the very least grants in substi-

[11] See Santa Fe Br., No. 302, Oct. T. 1924, p. 5: "* * * the real question in this case is whether, IN DETERMINING RIGHTS UNDER THE ACT OF JUNE 22, 1874, SAID ACT IS TO BE CONSTRUED AS IN *PARI MATERIA* WITH THE PARTICULAR GRANTING ACT UNDER WHICH RIGHTS ARE RELINQUISHED ON REQUEST OF THE SECRETARY OF THE INTERIOR?" [Capitals in original.] And see also Santa Fe Br. 11–18. The United States in the same case argued (though without resort to capital letters) that the Act of 1874 was not supplemental to the grant. U. S. Br., No. 302, Oct. T. 1924, pp. 9, 19–20. In view of the Court's studied refusal even to consider this issue, it is submitted that the Railroad's reliance on the decision for the proposition that the Acts of 1866 and 1874 are not *in pari materia* (Br. Opp. 6) is not well founded.

tution for grants in aid of construction. Consequently, all such grants which had not been perfected by the issuance of patents to specific land (or by the approval of selection lists, see pp. 32, 33, *infra*) remained in the status of "claims," and so were within the terms of the release.

We draw attention once again to the language of that instrument (R. 6–7), whereby the Railroad

> relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

We repeat what we consider to be the words plainly applicable here,

> all claims of whatever description to * * * compensation or reimbursement therefor on account of lands * * * granted * * * by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

There is nothing in the opinion of the court below which tends in even the slightest degree to

support the notion that this language was not fully adequate to extinguish the Railroad's claims under the Acts of 1874 and 1904. Nothing in that opinion, even assuming it to be otherwise correct, tends in even the slightest degree to suggest that the Railroad's claims were not "claims * * * to * * * compensation * * * on account of lands * * * granted * * * in aid of * * * construction." We repeat what we said above, pp. 15–16, the basic and all-pervading error of the court below lay in its failure to understand that the release covered not only claims to lands granted in aid of construction but also claims to compensation on account of lands granted in aid of construction.

The release contains three exceptions, none applicable here. It excepts (a) land sold to innocent purchasers for value prior to the date of the Transportation Act of 1940, (b) lands embraced in selections approved by the Secretary of the Interior prior to that date, and (c) lands already patented or certified to the Railroad or its predecessors. The present claims obviously fall into none of these categories; what the court below has done, therefore, was to write a new exception into the release. We need not belabor the proposition that it had no power to do so.

And the result is no different when we turn from the release itself to the provisions and legislative history of the statute which authorized its

execution, and pursuant to which it was specifically stated to be executed.[12] Here again the statutory reference is to "lands, interests in lands, compensation or reimbursement on account of lands," and the exceptions relate to the same three categories—patented lands, lands included in approved selection lists, and lands sold to *bona fide* purchasers.

The 1940 Act not only provides for the release of claims to lands "which have been granted, claimed to have been granted, or which it is claimed should have been granted", it also provides for the release of claims to "reimbursement on account of lands" that have been granted. This latter provision clearly covers land that had been granted, had vested and was later divested, either by sale to the Government, or as in the instant cases, by relinquishment, the privilege of selecting comparable land being given by way of reimbursement. Hence, it is immaterial that, at the time of the adoption of the 1874 and 1904 Acts, the construction of the road had been completed. If the applicability of the 1940 Act be restricted to the release of claims under the 1866 Act without

[12] The release, prescribed by the Secretary of the Interior (43 C. F. R. (1943 Cum. Supp.) § 273.64), was obviously intended to have the same scope as the Act itself. If the release should be construed as not relinquishing claims which the Act required to be released (cf. R. 39–40) and respondent insists on such claims, it must of course forego the concessions of the Act and repay everything which it has collected from the United States in excess of the former land-grant rate.

regard to the provisions of the 1874 and 1904 Acts, then the language relating to "reimbursement on account of lands" which had been granted would be mere surplusage.

Claims arising under the 1874 and 1904 Acts are either claims to lands granted in aid of construction (see *supra*, pp. 16-24), or they are claims to reimbursement on account of lands concededly granted under the 1866 Act in aid of construction, and which were relinquished. Considered in either light, they constitute claims which must be released under the Transportation Act of 1940 by a land grant railroad before such a railroad may have the benefit of the higher rates.

The court below laid much emphasis on the fact that the lands relinquished pursuant to the 1874 and 1904 Acts "had for all practical purposes vested in the railroad", and that it "was under no compulsion to release them, and it did so only because of a new promise by the government which guaranteed replacement lands" (R. 41). But the lands had been reconveyed and relinquished to the United States in 1911 and 1916 and this "new promise", guaranteeing replacement lands as reimbursement for the lands surrendered, left the Railroad in the same position it would have been in before any "lieu land" had vested in it. In other words, it had substitute claims to select lands. It was these latter claims

that the statute, by its plain words, required to be surrendered in return for the payment by the United States of full commercial rates. True, the Railroad did not have to forego the claims, any more than it was compelled to relinquish under the 1874 and 1904 Acts the lands originally granted. If the claims were released, the Railroad would benefit accordingly. It certainly should not be permitted the advantage of both the increased rates and the claims to land.

The statute by its terms makes no distinction based on the origin of the claim, nor does it justify creation of a fourth exception. Nor does the legislative history of the 1940 Act lend support to the qualification that was written into it by the decision below.

The Transportation Act of 1940 originated as S. 2009, 76th Cong., 1st sess., in which form it did not contain any provision for the payment of full rates to land-grant railroads upon the relinquishment of their claims to more land. Such a provision was inserted by the House Committee on Interstate and Foreign Commerce, which in its report (H. Rep. 1217, 76th Cong., 1st sess., p. 28) followed the terms of the bill in describing the release as one covering

> any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands

> or interests in lands, which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any land grant to such carrier or such predecessor in interest as aforesaid.[18]

In the House debates, the discussion covered only the merits of the proposal, and did not consider how the release should be construed. 84 Cong. Rec. 9715, 9718, 9747, 9864, 9865, 9972–9973, 10113–10119. An amendment to strike Section 321 from the bill was defeated, 84 Cong. Rec. 10113, 10119, and a further amendment which would have required the relinquishment of pending selection lists not yet approved by the Secretary and the reconveyance of unsold lands not used in the operations of the road in return for the rate concession was likewise defeated. 84 Cong. Rec. 10119–10121.

The bill went to a conference committee, which inserted the exception in respect of military or naval property and personnel. The conference report repeats the scope of the release in the pre-

[18] Separate bills designed to accomplish the same result as the amendment had been pending before the same and earlier Congresses. See, e. g., S. 1915, S. 1990, and H. R. 2531, 76th Cong., and S. 3876 and H. R. 10620, 75th Cong., and see *Government Rates on Railroads*, Hearings before the Senate Committee on Interstate Commerce on S. 1915 and S. 1990, 76th Cong., 1st sess., particularly at pp. 64–66, and 164–165.

cise language of the Act. H. Rep. 2832, 76th Cong., 3d sess., p. 93 (86 Cong. Rec. 10174).[14]

Nothing in the debates lends any substance to the suggestion of the court below that a further exception should be read into the Act to cover claims for compensation in kind in respect of lands once vested and thereafter reconveyed to the United States. Congress understood that it was writing finis to a long chapter in the Nation's history, and that conditions had entirely changed from the days when truly imperial grants had been deemed necessary to induce entrepreneurs

[14] The text insofar as here material is as follows:

LAND GRANT RATES

Section 321 of part II of title III of the House amendment provided that the full applicable commercial rates, fares, or charges should be paid to any common carrier subject to the Interstate Commerce Act for transportation of persons or property for the United States, or on its behalf, but this provision was conditioned on the release by the carrier of claims against the United States to lands, interests in lands, compensation or reimbursements on account of lands, or interests in lands which had been granted, claimed to have been granted, or which it was claimed should have been granted to such carrier, under any grant from the United States.

The conference substitute changes this provision by making an exception from this requirement of the payment of full commercial rates by the United States, in the case of the transportation of military or naval property moving for military or naval use, and in the case of the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty. In the case of transportation thus excepted, existing legal requirements and arrangements providing for reduced rates will continue to apply.

to build the lines of steel without which the West could not have been opened to settlement. Now it was time to close the books, to balance the accounts, to end the further disposal of public lands in aid of construction to which the United States was obligated. And it was up to the railroads to choose whether they would give up such vested rights to land or to claims to land as they may have held (other than approved selection lists, land sold to *bona fide* purchasers, and patented land) in return for the right to exact higher rates from the United States. Nowhere in the debates, nowhere in the Act, and nowhere in the release executed pursuant to the Act is there the slightest vestige of even a glimmering of a suggestion that claims for lieu lands under the Acts of 1874 and 1904 or under similar legislation were to be excepted from the final settlement, so that, as held under the ruling below, the Railroad was to get not only the higher rate but the right to receive more land as well.

II. Apart From the Merits, the Secretary's Construction of the Interrelationship Between the Acts of 1866, 1874, 1904, and 1940 Involved the Exercise of Discretion, Was Reasonable, Has Not Been Shown To Be Clearly Wrong, and Thus Is Impregnable to Mandamus

Up to now we have discussed only the substantive issues between the parties. Again following the precedent of *Santa Fe Pac. R. R.* v. *Work*, 267 U. S. 511, 517—"The case against the construction of the Act of 1874 urged by the Rail-

road Company is so clear that we prefer to put our decision directly on the merits of that issue"—the Court here can determine that the claims now in controversy are so plainly comprehended within the terms of the Railroad's release that decision of further matters is not required. But regardless of the correctness of the Secretary's view, regardless of whether he was right or wrong in rejecting the claims here involved, our present point is that his decision was a reasonable one, that it has not been shown to be clearly wrong, that making it involved the exercise of discretion, and that in consequence, it is, under a long line of cases in this Court which the court below wholly ignored, impregnable to mandamus.

A. IT HAS LONG BEEN SETTLED THAT DECISIONS BY THE SECRETARY OF THE INTERIOR IN MATTERS CONFIDED BY CONGRESS TO HIS DETERMINATION ARE, WHEN REASONABLE AND NOT PLAINLY WRONG, PROOF AGAINST MANDAMUS

We do not question that decisions of the Secretary of the Interior relating to the disposition of the public lands—a matter confided to his determination by Congress—are subject to judicial review. They are always subject to review. We simply say that such decisions, where they involve an exercise of discretion and insofar as they are not unreasonable or plainly wrong, will not be reversed or set aside by "injunction and relief

in the nature of mandamus" (R. 1, 19).[15] This rule is sustained by a long and unbroken line of authorities. *Litchfield* v. *Register and Receiver*, 9 Wall. 575; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *West* v. *Hitchcock*, 205 U. S. 80; *Ness* v. *Fisher*, 223 U. S. 683; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549; *Hall* v. *Payne*, 254 U. S. 343; *Work* v. *Rives*, 267 U. S. 175; *Wilbur* v. *United States*, 281 U. S. 206; *United States* v. *Wilbur*, 283 U. S. 414.

The function of the writ of mandamus was summarized in *Wilbur* v. *United States*, 281 U. S. 206. There Mr. Justice Van Devanter, speaking with his usual precision, said (pp. 218–219):

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense

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[15] The mandatory injunction here sought is in substance and effect the precise equivalent of a writ of mandamus, and its issuance is governed by identical considerations: *Gaines* v. *Thompson*, 7 Wall. 347, 352; *Miguel* v. *McCarl*, 291 U. S. 442, 452; cf. *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28, 33.

> construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

In the present case, the petitioners and their predecessors in the Department of the Interior did not have a plain ministerial duty, equivalent to a positive command, to ignore the release given by the Railroad pursuant to the Transportation Act of 1940; and it is apparent from the very terms of the opinion below that the Secretary's decision was neither unreasonable, untenable, nor plainly wrong. The court below said, "We perceive substantial reasons for endorsing the point of view advanced by the railroad," which was referred to as a "much sounder approach" (R. 40, 42). The court below concluded that "neither policy nor precedent is offended" by its holding,

which "will more clearly define and establish the respective interests involved" (R. 42).

The court below, therefore, has not held that the Secretary's construction was plainly wrong, but has simply expressed its own preference for a different construction of the statutes involved. The court's own analysis is itself proof that relief by way of injunction in the nature of mandamus should not have been granted here, on the authority of the cases cited *supra*, p. 40 — cases which, as we have noted, were not even referred to by the court below.

The rule that mandamus will lie against executive or administrative officers only when their duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command applies with equal force to the construction of statutes by the officers administering those statutes, as it does to cases involving determinations by them of questions of fact. *Work* v. *Rives*, 267 U. S. 175, 177–178; *Hall* v. *Payne*, 254 U. S. 343, 347–348; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Decatur* v. *Paulding*, 14 Pet. 497, 515. While the rule that decisions on questions of law which are not plainly wrong are proof against mandamus has been applied to numerous agencies,[16] it has special weight

[16] *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540 (Commissioner of Internal Revenue); *United States ex rel. Chicago &c. R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63 (I. C. C.); *Interstate Commerce Commission*

in cases involving the disposition of public lands by the Secretary of the Interior. See especially *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, where the Court said (pp. 324–325):

> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that

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v. *United States*, 289 U. S. 385, 394 (same); *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–204 (same).

> which he had reached, and which the law conferred upon him the jurisdiction to make.

In *Hall* v. *Payne*, 254 U. S. 343, the question was whether the relator's application for a homestead entry should be given priority, and that in turn depended upon the construction given a certain statute by the Secretary of the Interior. The Secretary's construction resulted in priority being given to one applicant, and the relator sought mandamus to require the Secretary to approve another application. In denying the writ, the Court said (pp. 347–348):

> * * * From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. * * * He [the Secretary] could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. * * *

Similarly, in *Wilbur* v. *United States*, 281 U. S. 206, the Secretary of the Interior, on the advice of his Solicitor, had ruled that relators were entitled to share in interest annuities from certain

Indian tribal funds. Eight years later a succeeding Secretary of the Interior, adopting and applying an opinion given by a succeeding Solicitor, put a different construction on the pertinent statute and ruled that the relators were not entitled to share in the interest annuities. The relators sought a writ of mandamus to compel the Secretary to set aside the second ruling and to give effect to the first, urging as one of their grounds that the second ruling was erroneous. Mandamus was denied, the Court saying (pp. 221–222):

> The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all *questions of law* the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the exercise of judgment and discretion is rather plain. * * *
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> * * * * * *

> From what has been said it follows that the case is not one in which mandamus will lie. [Italics added.]

There is no need to extend the discussion. While of course there are cases where mandamus has issued, instances where the Secretary had ignored the plain command of a statute or departed from a plain official duty (e. g., *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197; *Wilbur* v. *Krushnic*, 280 U. S. 306), or where the issues between the parties had been authoritatively determined and his only duty was the ministerial one of making payment pursuant to the award (e. g., *Ickes* v. *Ledbetter*, 77 U. S. App. D. C. 358, 135 F. 2d 658), here the court below did not purport to decide that this was a case falling within those categories.

We have discussed at some length the nature of the issues before the Secretary, and the interrelationships between the statutes he was required to construe. *Supra*, pp. 16–38. The court below did not hold that the Secretary's duty in the premises was purely ministerial, or that he departed from a plain official duty; to the contrary, as we have already pointed out, it simply expressed its own preference for one construction of the statutes involved. It has treated the case as though the matter were before it on appeal from the Secretary; the effect of its holding, therefore, is to compel the Secretary to exercise his judgment and

discretion in a particular way. This cannot be done under the authorities cited and discussed above, pp. 40–46. The writ of mandamus may not "be used as a writ of error." *Work* v. *Rives*, 267 U. S. 175, 183. "Where there is discretion, * * * even though its conclusion be disputable, it is impregnable to mandamus." *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555.

B. THE FOREGOING RULE IS NOT CHANGED BY ANYTHING IN THE ADMINISTRATIVE PROCEDURE ACT, IF INDEED ITS PROVISIONS ARE APPLICABLE TO THE PRESENT PROCEEDINGS

The writs of certiorari in the present cases were granted on June 10, 1946 (R. 47). On the following day the President approved the Administrative Procedure Act (Public No. 404, 79th Cong., 2d sess.), which in Section 12 provides among other things that

> This Act shall take effect three months after its approval except that sections 7 and 8 [Hearings, Decisions] shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

The only section which could conceivably apply here would be Section 10—Judicial Review—which became effective September 11, 1946. For

the reasons pointed out below, pp. 49–54, we do not believe that this section was intended to change the scope of review applicable to a case such as the present one, nor to abrogate or limit the rule just discussed. But, in any event, and regardless of the scope of Section 10, we believe that its provisions are not and were not intended to apply to pending proceedings.

Neither in the Act nor its legislative history is there any reference to judicial proceedings seeking review of administrative action which had already been commenced. There is, throughout the legislative history, evidence of intent to afford the various agencies ample time to prepare and make such adjustments in their procedure as the provisions of the Act may require, H. Rep. 1980, 79th Cong., 2d sess., p. 47; S. Rep. 752, 79th Cong., 1st sess., p. 30, and this intent is underscored by the portions of Section 12 quoted above.

It would be anomalous to suppose that Congress intended to make a procedural requirement of the Act inapplicable to an administrative proceeding initiated before the effective date of the requirement but applicable to a judicial proceeding concluded in the lower courts before the effective date of the requirement.[17]

It is not necessary in this case to determine

[17] The general principle that statutes are not to be construed retrospectively, see *United States* v. *Heth*, 3 Cranch 399, 413, is applicable also to statutes governing procedure. E. g., *United States* v. *St. Louis, etc., Ry. Co.*, 270 U. S. 1, 3.

the precise point at which Section 10 would apply. It is sufficient to note that to have that section apply, as here, at some appellate stage of a pending proceeding, would not make for certainty or stability of administrative action, and would be productive only of confusion. While undoubtedly Congress had the power to change the scope of judicial review so as to affect pending proceedings, even at the ultimate appellate stage, the consequences of such a change would be so unsettling that clear and unmistakable evidence of an intention to effect that result should be required. Here there is no such evidence. Accordingly, it seems clear that the provisions of Section 10, which went into effect on September 11, 1946, were, at the very least, not intended to affect the scope of judicial review in proceedings in which certiorari had been granted well before that date.

In any event, the terms and legislative history of the Administrative Procedure Act make it abundantly clear that Section 10 was designed, in general, to restate existing law, and that there was no disposition on the part of the Act's sponsors to change the well settled rule, *supra*, pp. 39-47, that decisions of the Secretary involving the exercise of judgment and discretion, which are not shown to be plainly wrong, will not be set aside by the courts by process in the nature of mandamus.

The general legislative history of the Administrative Procedure Act is set out in S. Doc. 248, 79th Cong., 2d sess., and will not be repeated here. See also 14 U. S. Law Week 2709–2728. We set out below only so much of the background of Section 10 as is applicable here.

Section 10 (b), providing for the form of review, expressly includes "declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus." Section 10 (c) relates to agency action which is reviewable; the changes made by the House Judiciary Committee seem to have been largely in the nature of clarifying amendments. See H. Rep. 1980, 79th Cong., 2d sess., p. 55, n. 21; cf. S. Rep. 752, 79th Cong., 1st sess., p. 27. Section 10 (e) was amended by the House Committee to add "an abuse of discretion" to subsection (B) (1), so as to make it clear that the bill preserved judicial review of abuses of discretion. H. Rep. 1980, *supra*, at p. 55, n. 22.

In the debates, the intent with respect to the scope of judicial review is perhaps most accurately reflected by the following colloquy (92 Cong. Rec. 2195):

> Mr. DONNELL. I should like to ask the distinguished Senator a question. Section 10 of the bill recites in part that—
>
> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) Right of review: Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

It has occurred to me the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no judicial review of action taken by the agency. The point to which I request the Senator to direct his attention is this: In a case in which a person interested asserts that, although the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have judicial review of the action so taken by the agency?

Mr. McCarran. Mr. President, let me say, in answer to the able Senator, that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes a decision, then it is subject to review.

But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by

statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

Mr. DONNELL. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims there has been an abuse of that discretion. Is that correct?

Mr. MCCARRAN. It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning.

And see 92 Cong Rec. 2200.

Generally, most contemporaneous comments stress that the bill did not change existing law as to the scope of judicial review. The original draft of Section 10, prepared by the American Bar Association's Committee on Administrative Law, carried the comment that it did not attempt to expand the scope of judicial review. 30 A. B. A. J. 46.[18] The Attorney General advised the Senate Judiciary Committee that Section 10, "in general, declares the existing law concerning judicial review" (S. Rep. 752, 79th Cong., 1st sess., p. 43), a view to which he consistently adhered. See his memorandum (92 Cong. Rec. A3154), which states:

[18] And see Hearings before the House Committee on the Judiciary on H. R. 1203, 79th Cong., 1st sess., p. 38.

> Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at section 10 as an attempt by Congress to place into statutory language existing methods of review.

In view of this legislative history, and in view of the circumstance that nothing in the language of Section 10 indicates any intention to interfere with the exercise of a discretionary power vested in any agency, in so far as such exercise does not involve an abuse of discretion, we think it plain that Congress did not intend to disturb the settled rule discussed at length above, pp. 39–47, which renders the discretionary decisions of the Secretary of the Interior immune from mandamus where such decisions are neither unreasonable nor

plainly wrong, and where no abuse of discretion is involved. From *Litchfield* v. *Register and Receiver,* 9 Wall. 575, at the December Term, 1869, through *United States* v. *Wilbur,* 283 U. S. 414, decided in October Term, 1930, that rule has never been questioned or qualified. Certainly if Congress intended to alter a principle so firmly and explicitly established, apt language to do so could easily have been fashioned and would certainly have been used. The circumstance that the rule as to the scope of relief in the nature of mandamus was not referred to seems to us proof positive, in the face of the language and legislative history of Section 10 of the Administrative Procedure Act, that no change therein was intended to be made. Consequently, without at this time examining whether, in other respects, the Act may have contemplated some slight alterations in the scope of judicial review in other connections, we assert with confidence that, as to the rule discussed in the present brief, no change whatever was either effected or intended to be effected.

CONCLUSION

The judgments below should be reversed, with directions to reinstate the judgments of the district court.

Respectfully submitted.

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OCTOBER 1946.

APPENDIX

The relevant parts of the Act of July 27, 1866, c. 278, 14 Stat. 292, are as follows:

An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.

* * * * * *

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and, whenever, prior to said time, any of said sections or parts

of sections shall have been granted, sold, reserved, occupied by said homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."

The Act of June 22, 1874, c. 400, 18 Stat. 194, 43 U. S. C. 888, is as follows:

"*An act for the relief of settlers on railroad lands.*

* * * That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided,* That nothing herein contained shall be in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further,* That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road

and prior to the notice to the local land-office of the withdrawal of such lands from market.

The Act of April 28, 1904, c. 1810, 33 Stat. 556, provides in part as follows:

> *An Act for the relief of small-holding settlers within the limits of the grant of land to the Atlantic and Pacific Railroad Company in the Territory of New Mexico.*
>
> * * * That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

Section 321 of the Transportation Act of 1940, Act of September 18, 1940, c. 722, 54 Stat. 954, 49 U. S. C. 65, is as follows:

> SEC. 321. (a) Notwithstanding any other provision of law, but subject to the pro-

visions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for the transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail: *Provided, however,* That any carrier by railroad and the United States may enter into contracts for the transportation of the United States mail for less than such rate: *Provided further,* That section 3709, Revised Statutes, (U. S. C., 1934 edition, title 41, sec. 5), shall not hereafter be construed as requiring advertising for bids in connection with the procurement of transportation services when the services required can be procured from any common carrier lawfully operating in the territory where such services are to be performed.

(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such trans-

portation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

The Administrative Procedure Act, Public No. 404, 79th Cong., 2d sess., provides in pertinent part as follows:

JUDICIAL REVIEW

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency

action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute, or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments of writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judical enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action mean-

while shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the

facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudical error.

* * * * *

CONSTRUCTION AND EFFECT

SEC. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

U. S. GOVERNMENT PRINTING OFFICE: 1946

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

Nos. ~~1192-1193~~ 97-98

JULIUS A. KRUG, OSCAR L. CHAPMAN, and FRED W. JOHNSON, *Petitioners,*

v.

SANTA FE PACIFIC RAILROAD COMPANY, *Respondent.*

On Petition for Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

LAWRENCE CAKE,
Attorney for Respondent.

PARKER PRINTING CO., WASHINGTON, D. C.

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OPINIONS BELOW.

The opinion of the District Court (R. 19-24) is reported in 57 F. Supp. 984. The opinion of the United States Court of Appeals for the District of Columbia (R. 53-58) is reported in 153 F.(2d), 305.

JURISDICTION.

The jurisdiction of this court to review the judgment, by certiorari, is under section 240(a) of the Judicial Code, as amended; U. S. Code, Title 28, section 347.

THE QUESTION PRESENTED.

The question presented to and decided by the courts below was whether the rights of the railroad company to "select" certain public lands, *in lieu of other lands which the railroad company had previously reconveyed to the United States* under the Acts of June 22, 1874, and April 28, 1904,—were claims to lands granted "*in aid of the construction of any portion of its railroad*" and therefore within the terms of a certain release executed by the railroad company pursuant to section 321(b), Title III, of the Transportation Act of 1940.

If such selection rights under the Acts of 1874 and 1904 are claims to lands granted *in aid of construction*, they were extinguished by the release. If they are not claims to lands granted in aid of construction, then they are valid selection rights which the Department of the Interior has wrongfully and mistakenly rejected and refused to recognize, solely because of the release.

The District Court held that the Acts of 1874 and 1904 were supplemental to and in legal effect amendatory of the original granting act of July 27, 1866; that the lands to be selected under the Acts of 1874 and 1904 were in substitution for the lands originally granted by the Act of 1866 in aid of construction; that the railroad company's rights to select lieu lands under the Acts of 1874 and 1904 were therefore claims to lands granted in aid of construction and within the scope of and extinguished by the release.

The United States Court of Appeals for the District of Columbia in reversing the District Court, held (1) that the release was a release of further claims to lands granted in aid of construction, and (2) that the selection rights in ques-

tion, under the Acts of 1874 and 1904, were not claims to lands granted in aid of construction.

Both courts assumed jurisdiction and decided the case on the merits.

STATEMENT FOR RESPONDENT IN OPPOSITION TO CERTIORARI.

1. This suit is not—as suggested in the petition for certiorari (page 7)—"an attempt to avoid" the release filed pursuant to the Transportation Act of 1940.

Respondent has given full effect to that release by relinquishing all further claims to approximately 1,500,000 acres granted by the Act of July 27, 1866, and earned by the construction of the railroad, but not patented to respondent. See *Transportation—Information Concerning Land Grants for Roads, Canals, River Improvements, and Railroads*—Information Bulletin, 1939 Series, No. 5 (Government Printing Office: 1940), which shows the status of the Atlantic and Pacific grant as of June 30, 1938, as follows:

GRANTS PRACTICALLY ADJUSTED, BUT NOT CLOSED

Name of railroad	Date of grant	Area of grants in acres	Acres patented	Amount due [in acres]
. . . . .				
Atlantic & Pacific R. R. Co. (Western Division)	July 27, 1866 (14 Stat. 292)	13,423,237.02	11,917,309.83	1,505,927.19
. . . . .				

See also statement issued on March 13, 1941, by the Department of the Interior, Information Service, after the release filed by respondent was approved by the Secretary of Interior, as follows:

> "The claim of the Atchison, Topeka and Santa Fe Railroad Company to approximately 1,400,00 acres of public land in Arizona and New Mexico has been 'cancelled out' after 75 years of railroad land grant negotiations, with the approval of a land grant claim

release submitted by that railroad, Secretary of the Interior Harold L. Ickes announced today.

"The release of the Santa Fe constitutes the second instance in which land is being relinquished to the Government under provisions of the Transportation Act of 1940. The first relinquishment, made by the Southern Pacific Railroad, involved about 2,000,000 acres of public land in Southern California.

"Approval of the release by Secretary Ickes clears the track for the Santa Fe to take advantage of increased rates for certain classes of Government freight and passenger business on mileage of its early land-grant road predecessor, the Atlantic and Pacific Railroad Company, from Isleta, New Mexico, to the Colorado River in Arizona in the vicinity of Needles, California. Under the Transportation Act, railroads originally constructed with the aid of public land may discontinue preferential reduced rates for certain forms of Government traffic if, as and when the roads receive approval by the Secretary of the Interior of a formal release of any claim under such grants.

"One of the factors in the expansion of the nation's transportation network westward to the Pacific, the Atlantic and Pacific Railroad Company was awarded a grant of approximately 13,423,000 acres of the public domain by Congress in 1866, according to General Land Office records. Of this original grant, the railroad received title to approximately 11,917,000 acres from the United States. Claims for the unpatented area of approximately 1,400,000 acres, now have been relinquished by the release submitted by the Santa Fe."

Respondent's position in this suit (which has been sustained by the court below) is that the release has nothing whatever to do with the approval of the selections here in question which are in completion of *exchanges* proposed by the Secretary of the Interior under the Acts of 1874 and 1904 and *partly executed* by respondent's reconveyance to the United States of the base lands sought by the United States.

2. The release executed and filed by respondent (R. 8-9) was specifically a release of any and all claims of whatever

description to lands, etc: "granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or any predecessor in interest *in aid of the construction of any portion of its railroad*".

This was the exact form prescribed by the Secretary of the Interior in General Land Office Circular 1480 (6 F. R. 422) including the words "in aid of the construction of any portion of its railroad"—and was in strict compliance with the statute.

Obviously the words "any act of the Congress" were necessary because the form was prescribed for use by all railroads which had received grants in aid of construction, under many different acts of Congress. This is clear from Section 273.64 of Circular 1480, 6 F. R. 422, which prescribed the form of the release, as follows:

> "273.64. *Form of release.* The release must be substantially in the following form:
>
> "The . . . Railroad (Railway) Company, a corporation organized and existing by virtue of the laws of the State of . . ., with office and principal place of business at . . ., in the state of . . ., hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted or claimed should have been granted by any act of the Congress to the . . . Railroad (Railway) Company or to any predecessor in interest in aid of the construction of any portion of its railroad.
>
> "This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been

patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

"(Followed by seal, signatures, execution and acknowledgment.)"

3. Contrary to the argument suggested in support of the Government's position as stated in the petition for certiorari, this Court has held in *Santa Fe Pacific R. Co.* v. *Work*, 267 U. S. 511, that the Act of 1874 and the granting Act of 1866 are not *in pari materia* to the extent that the provisions of the Act of 1866 must be read into the Act of 1874. In that case the railroad company attempted to select, under the Act of 1874, lands classified as coal lands notwithstanding a provision in the Act of 1874 that only "public lands not mineral" could be selected under that act—the argument for the railroad company being that the Act of 1874 was in legal effect amendatory of the granting act of 1866; that the latter granted and authorized indemnity selection of lands containing coal and iron by expressly providing that the word "mineral" as used in the granting act was not to be considered as including coal and iron; and that the word "mineral" as used in the Act of 1874 should be given the same construction. This court, however, held that the two acts were separate and distinct and that the construction argued for the Act of 1874 was not justified.

That the Act of 1904 likewise was new and independent legislation and in no sense amendatory of the Act of 1866 is apparent on its face. It plainly and in simple terms offered a trade, section for section, of public lands for lands owned by the railroad company. Compare *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, which like the present case (No. 1192) was a suit to enjoin the Secretary from rejecting and cancelling lieu selections under the Act of 1904 on the ground that his action was erroneous and arbitrary.

4. That in certain cases and within judicially defined limits an aggrieved party is entitled to a judicial review of the action of an administrative officer, such as the Secretary of the Interior, and that such review may be had by an ac-

tion for injunction or mandamus in the Courts of the District of Columbia is not a novel question. It has recently been given consideration in *Stark* v. *Wickard*, 321 U. S. 288. Compare *Hannegan* v. *Esquire*, No. 399, October Term 1945.

The historic use of the remedy of injunction or mandamus in cases involving the Secretary of the Interior and rights claimed under the public land laws, is illustrated by many cases. *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492; *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, *Ickes* v. *Fox*, 300 U. S. 82.

Santa Fe Pacific R. Co. v. *Fall*, 259 U. S. 197, for example, was a suit to enjoin the Secretary of the Interior from rejecting and cancelling selections *under the same act*, the Act of April 28, 1904, which is involved in one of the present cases, and the use of injunction as a remedy was recognized and approved.

5. The opinion of the United States Court of Appeals for the District of Columbia (R. 53-58) evidences a full understanding of the issues presented and the respective positions of the parties, and reaches a sound conclusion on the law. Further argument, therefore, seems unnecessary.

Respectfully submitted,

LAWRENCE CAKE,
Attorney for Respondent.

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On writs of certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENT.

LAWRENCE CAKE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 14-18) is reported in 57 F. Supp. 984. The opinion of the United States Court of Appeals for the District of Columbia (R. 36-42) is reported in 153 F. (2d) 305.

JURISDICTION.

The judgments of the Court of Appeals were entered on February 4, 1946 (R. 43). The petition for writs of certiorari was filed on May 3, 1946, and allowed on June 10, 1946 (R. 47). The jurisdiction of this court is based on Section 240(a) of the Judicial Code, as amended; 28 U. S. Code, section 347.

THE QUESTIONS PRESENTED.

(1) On the merits, the question presented is whether the respondent's right to "select" and to have patented to it certain public lands, in exchange for other lands which respondent had previously reconveyed to the United States, *pursuant to the acts of June 22, 1874, and April 28, 1904*—is a claim to lands granted "in aid of the construction of any portion of its railroad" and therefore within the terms of a certain release—executed by respondent pursuant to the Transportation Act of 1940—of further claims to lands granted "in aid of the construction of any portion of its railroad."

If such selection rights *under the Acts of* 1874 *and* 1904 are claims to lands granted *in aid of construction*, they were extinguished by the release. If they are not claims to lands granted in aid of construction, then they are valid selection rights which petitioners have wrongfully and mistakenly rejected and refused to recognize solely because of the release.

(2) The Government also raises a secondary question whether the Secretary's construction of the statutes in question—the Acts of 1874 and 1904 above cited, and the Act of July 27, 1866 which provided for a grant of lands to respondent's predecessor in aid of the construction of its railroad—involves the exercise of a discretion not reviewable by the courts and whether the courts below had or have jurisdiction to grant the relief sought, by injunction or mandatory order.

STATUTES INVOLVED.

The relevant parts of the Act of July 27, 1866, c. 278, 14 Stat. 292, entitled An Act granting lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast; the Act of June 22, 1874, c. 400, 18 Stat. 194, entitled An Act for the relief of settlers on railroad lands; the Act of April 28, 1904, c. 1810, 33 Stat. 556, entitled An Act for the relief of small-holding settlers within the limits of the grant of land to the Atlantic and Pacific Railroad Company in the Territory of New Mexico; and the Act of September 18, 1940, c. 722, 54 Stat. 954, entitled the Transportation Act of 1940, are set out in the Appendix to petitioners' brief, pages 56-61.

STATEMENT OF THE CASE.

Respondent (hereinafter referred to as Santa Fe Pacific) is successor to the Atlantic and Pacific Railroad Company, a corporation created by the Act of July 27, 1866, c. 278, 14 Stat. 292, and to the grant of lands to the said company to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast (R. 2, 20).

Included in the lands granted to the Atlantic and Pacific Railroad Company, and acquired and owned by Santa Fe Pacific as successor to Atlantic and Pacific, were two quarter-quarter sections in New Mexico described in paragraph 5 of the complaint in No. 97 (R. 2) and six quarter-quarter sections in Arizona described in paragraph 5 of the complaint in No. 98 (R. 20). These lands were within the primary or place limits of the grant, title to which vested in the grantee as of March 12, 1872, upon the definite location of the railroad (R. 2, 20).

In 1911 the Commissioner of the General Land Office requested Santa Fe Pacific to relinquish to the United States the whole section which included the two quarter-quarters in New Mexico above mentioned. This relinquishment was requested pursuant to the Act of April 28, 1904, c. 1810, 33

Stat. 556 (R. 2). Santa Fe Pacific acquiesced and by deed of relinquishment dated December 18, 1911, reconveyed the section in question to the United States. The relinquishment was accepted and approved by the Secretary of the Interior, and Santa Fe Pacific was notified that it was authorized to select other lands, in lieu of the lands relinquished, pursuant to the Act of April 28, 1904 (R. 3).

In 1916 Santa Fe Pacific was likewise requested by the Commissioner of the General Land Office to relinquish among other lands the six quarter-quarter sections in Arizona above mentioned. This relinquishment was requested pursuant to the Act of June 22, 1874, c. 400, 18 Stat. 194 (R. 20). Santa Fe Pacific acquiesced and by deeds of relinquishment dated November 27, 1916, and December 15, 1916, reconveyed the lands described to the United States. This relinquishment was likewise accepted and Santa Fe Pacific was notified that it was authorized to select other lands, in lieu of the lands relinquished, pursuant to the Act of June 22, 1874 (R. 20).

Neither the Act of June 22, 1874, nor the Act of April 28, 1904, imposed any limitation of time on the right to select other lands, in lieu of lands relinquished and reconveyed to the United States pursuant to those acts, and under the regulations and practice of the Department of the Interior such selections were permitted at any time, provided they were within the terms of the act in question and provided also that they were based on a relinquishment which had not already been used as base for a similar lieu selection. See General Land Office Circular No. 522, January 24, 1917, 45 L. D. 617, as amended by Instructions of February 5, 1932, 53 I. D. 592; Code of Federal Regulations, Title 43, secs. 273.56-273.57.

August 28, 1940, Santa Fe Pacific exercised its right of selection based on the relinquishment of the two quarter-quarters in New Mexico above mentioned, by making and filing a selection of two other quarter-quarter sections in New Mexico, described in paragraph 8 of the complaint in No. 97 (R. 3). It is alleged in the complaint, and admitted

by the motion to dismiss, that the lands so selected were vacant public land available for selection; that the selection was made under the Act of April 28, 1904, in lieu of the lands relinquished as above stated; and that the relinquished lands had not theretofore been designated as base for any similar selection (R. 3).

March 23, 1943, Santa Fé Pacific exercised its right of selection based on the relinquishment of the six quarter-quarters in Arizona above mentioned, by making and filing selections of other lands described in paragraph 9 of the complaint in No. 98 (R. 20-21). It is alleged in the complaint, and admitted by the motion to dismiss, that the lands so selected were vacant public land available for selection; that the selections were made under the Act of June 22, 1874, in lieu of the lands relinquished as above stated; and that the relinquished lands had not theretofore been designated as base for any similar selections (R. 21, 22).

In both cases, by decisions of May 15 and 22 and June 12, 1943, the Commissioner of the General Land Office held the selections for rejection on the ground that Santa Fe Pacific had no further rights under the Act of June 22, 1874, or the Act of April 28, 1904, in view of a release which Santa Fe Pacific had filed, on December 18, 1940, of

> "any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad."[1]

This release was filed pursuant to Section 321 (b), Title III, Part II, of the Transportation Act of 1940, and was accepted and approved by the Secretary of the Interior on March 1, 1941 (R. 3-4, 6-7, 21).

[1] The release excluded lands which had already been patented or certified to Santa Fe Pacific or its predecessor, and some other categories of lands not material to this case.

Santa Fe Pacific appealed to the Secretary of the Interior, and upon denial of the appeal moved for rehearing, to no avail (R. 4, 21).

Santa Fe Pacific thereupon filed in the District Court the complaints herein, in each case praying a judgment enjoining the defendants—the Secretary of the Interior, the Assistant Secretary of the Interior, and the Commissioner of the General Land Office—from rejecting the selections in question on the ground that they were barred by the release, and directing them to determine the rights of Santa Fe Pacific to the selected lands without regard to the release (R. 1-6, 19-23).

In each case the defendants (petitioners here) moved to dismiss the complaint on the ground that it failed to state a case in which relief could be granted. In each case the District Court allowed the motion and dismissed the complaint, the District Court being of the opinion that the Acts of 1874 and 1904 were a part of the same legislative scheme as the granting act of 1866, that lands selected pursuant to the Acts of 1874 and 1904 were in substitution for the original lands granted by the Act of 1866 in aid of construction, and that Santa Fe Pacific's rights to select lieu lands under the Acts of 1874 and 1904 were, therefore, claims to lands granted in aid of construction and within the scope of and extinguished by the release (R. 14-18, 35).

Santa Fe Pacific then appealed to the United States Court of Appeals for the District of Columbia. The two cases were heard together and disposed of in one opinion, the Court of Appeals reversing the District Court. The majority of the Court of Appeals held:

1. That the Transportation Act of 1940 required and the release filed pursuant thereto was in terms a release of further claims to lands granted *in aid of construction.*

2. That the Acts of 1874 and 1904 were not grants in aid of construction, nor amendments of the Act of 1866, but were separate statutes enacted for the purpose of authorizing voluntary exchanges of lands previously granted to the railroad company for other lands to be selected, and that

the railroad company's right to make such selections, in completion of such voluntary and partly executed exchanges, is not a claim to lands granted "in aid of the construction of any portion of its railroad" and therefore not affected by the release filed pursuant to the Transportation Act of 1940.

SUMMARY OF THE ARGUMENT.

I. The Transportation Act of 1940 required and the release filed by Santa Fe Pacific pursuant thereto was in terms a release of further claims to lands, or interests therein, granted "in aid of the construction of any portion of its railroad."

The claims so released, so far as Santa Fe Pacific alone was concerned, involved approximately 1,500,000 acres of indemnity lands lost to the grant, and no question has ever been raised as to the validity or effect of the release as to those lands or claims.

The release of such claims has nothing whatever to do with the selections here in question which are in completion of exchanges proposed by the Secretary of the Interior under the Acts of 1874 and 1904 and partly executed by respondent's reconveyance to the United States of the base lands sought by the United States.

II. The Acts of 1874 and 1904 were not amendments of the Act of 1866, but were separate and distinct enactments for the purpose of enabling the United States to recover title to lands previously granted in aid of construction (and which the United States sought to recover for the benefit of settlers), in exchange for which the Acts of 1874 and 1904 tendered to the railroad company the right to select other public lands in lieu of such lands voluntarily relinquished and reconveyed to the United States.

The Act of 1866—the granting act in aid of construction—expressly provided for indemnity selections where lands within the primary or place limits of the grant were lost to the grant, and that right of indemnity was a part

of the grant in aid of construction, and therefore—to the extent that it was unsatisfied at the time of the release filed pursuant to the Transportation Act of 1940—was a claim to lands granted in aid of construction.

The rights here in question, on the other hand, are rights based on the Acts of 1874 and 1904 and, in each case, the offer and acceptance resulting from the Government's request for relinquishments and the railroad company's action in so relinquishing and reconveying the lands sought by the Government. The lieu lands selected in completion of such voluntary exchanges, under the Acts of 1874 and 1904, are therefore not claims to lands granted in aid of construction.

It is not enough to say that such lands selected under the Acts of 1874 and 1904 are in substitution for lands originally granted. That is not the question here presented. The question is whether the lands now selected in completion of such voluntary exchanges are themselves lands *claimed as granted in aid of construction.*

The voluntary character of the exchanges in question is what differentiates the railroad company's right to the lands selected, from its right to *indemnity* under the Act of 1866, the latter being precisely the further claim to lands granted in aid of construction which was released pursuant to the Transportation Act of 1940.

III. The relief sought—by injunction or mandatory order—is within the jurisdiction of the courts below, and the granting of such relief in these cases does not encroach on the lawful exercise of any discretion vested in the Secretary of the Interior.

The historic use of the remedy of injunction or mandamus in cases involving the Secretary of the Interior and rights claimed under the public land laws is supported by many cases. *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492; *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197; [illegible]s v. *Fox*, 300 U. S. 82.

The Administrative Procedure Act, Public No. 404, approved June 11, 1946, section 10 of which is concededly a

restatement of existing law, is legislative recognition of respondent's right to a judicial review of the action of the Secretary of the Interior in these cases, under the decisions cited.

ARGUMENT.

I. The release filed by respondent pursuant to the Transportation Act of 1940 was a release of further claims to lands granted in aid of construction.

The legislative history of the Transportation Act of 1940 throws little or no light on the origin of subsection (b) of section 321, Title III, Part II. The act as a whole was the culmination of numerous proposals and bills to amend the Interstate Commerce Act and to extend its application to other forms of transportation, in particular to water carriers. The bill which finally became the Transportation Act of 1940 was S. 2009, 76th Congress, First Session. Section 321, Title III, Part II, was added to the bill as new legislation by the House Committee on Interstate and Foreign Commerce, with a brief statement in the report of the Committee of the terms of the two subsections but no further explanation. H. Rept. 1217, 76th Congress, First Session. After passage by both Houses, the bill was considered by a conference committee and further amended, including an amendment of subsection (a) of section 321, Title III, Part II, but the only further explanation of subsections (a) and (b) in the report of the conference committee is a brief statement of the terms thereof. H. Rept. 2016, 76th Congress, Third Session.

The purpose of section 321 was obviously: (1) to make certain rate concessions to the carriers by eliminating land-grant rates on non-military traffic, and (2) as a condition thereto, to obtain the release and relinquishment to the United States of all remaining unadjusted land grants in aid of the construction of railroads.

The releases, required as a condition to the rate concessions, were not general releases of any and all claims against the United States of whatever character, but were

specifically releases of any claims of carriers by railroad to lands, or interests therein, claimed by such carriers under any grants to them or their predecessors in interest in aid of the construction of their railroads. The statute expressly so provided:

> "(b) If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States *to aid in the construction of any part of the railroad operated by it*, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a)[4] of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest *as aforesaid*." (Italics added)

The regulations also expressly so provided, including a form of release which recited that the company executing the release "relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interest therein" etc. "granted, claimed to have been granted or claimed should have been granted by any act of the Congress to the..... Railroad (Railway) Company or to any predecessor in interest *in aid of the construction of any portion of its railroad*". General Land Office Circular No. 1480, Section 273.64; 6 F. R. 422; Code of Federal Regulations, Title 43, Section 273.64. (Italics added)

The release filed by respondent and accepted and approved by the Secretary of the Interior was in the form prescribed and was expressly a release of

"any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest *in aid of the construction of any portion of its railroad.*" (R. 6)

This was the exact form prescribed by the Secretary of the Interior in General Land Office Circular 1480 (6 F. R. 422) including the words "in aid of the construction of any portion of its railroad"—and was in strict compliance with the statute.

Obviously the words "any act of the Congress" were necessary because the form was prescribed for use by all railroads which had received grants in aid of construction, under many different acts of Congress. This is clear from Section 273.64 of Circular 1480, 6 F. R. 422, which prescribed the form of the release, as follows:

"273.64. *Form of release.* The release must be substantially in the following form:

"The . . . Railroad (Railway) Company, a corporation organized and existing by virtue of the laws of the State of . . ., with offices and principal place of business at . . ., in the state of . . ., hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted or claimed should have been granted by any act of Congress to the . . . Railroad (Railway) Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

"This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the

company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

"(Followed by seal, signatures, execution and acknowledgment.)"

The history of such grants in aid of the construction of railroads is well known. For a review of the numerous acts which granted lands in aid of construction, see *Public Aids to Transportation—Federal Coordinator of Transportation*, Vol. II, pages 3-42. For description and references to specific grants, see also: *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492 (Atlantic and Pacific grant); *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228 (Central Pacific grant); *United States* v. *Northern Pacific R. Co.*, 256 U. S. 51 (Northern Pacific grants); *Southern Pacific R. Co.* v. *Fall*, 257 U. S. 460 (Southern Pacific main line grant).

The status of the Atlantic and Pacific grants as of June 30, 1938, is shown in *Transportation—Information Concerning Land Grants for Roads, Canals, River Improvements and Railroads*, Information Bulletin 1939, Series No. 5 (Government Printing Office: 1940), as follows:

GRANTS PRACTICALLY ADJUSTED, BUT NOT CLOSED

Name of railroad	Date of grant	Area of grants in acres	Acres patented	Amount due [in acres]
* * * * * * *				
Atlantic & Pacific R. R. Co. (Western Division)	July 27, 1866 (14 Stat. 292)	13,423,237.02	11,917,309.83	1,505,927.19
* * * * * * * * *				

This was approximately the status of the unadjusted Atlantic and Pacific grant when the Transportation Act of 1940 was enacted, and it was obviously for the purpose of writing off and extinguishing such unsatisfied indemnity claims under the original granting acts that subsection (b) was written into the Transportation Act of 1940.

The release required by subsection (b) was filed in compliance with the act and the regulations prescribed by the

Secretary of the Interior, with the result that respondent has released and relinquished all further claims to approximately 1,500,000 acres of land granted by the Act of July 27, 1866, and earned by the construction of the railroad, but never patented to respondent or its predecessor.

Respondent's position in these cases is that the release has nothing whatever to do with the selections here in question which are in completion of *exchanges* proposed by the Secretary of the Interior under the Acts of 1874 and 1904 and *partly executed* by respondent's reconveyance to the United States of the base lands sought by the United States. It is respectfully submitted that this is not—as suggested in the brief for petitioners (page 10)—"an attempt to avoid" the release.

II. Respondent's rights to select lands under the Acts of 1874 and 1904, in completion of voluntary and partly executed exchanges under those acts, are not claims to lands granted in aid of construction.

The Act of June 22, 1874, was a remedial act which provided that in cases where actual settlers were found to have entered on lands granted to any railroad company, the railroad company might relinquish such lands to the United States and "shall be entitled to select an equal quantity of other lands in lieu thereof". The act came before this court in *Santa Fe Pacific R. Co.* v. *Work*, 267 U. S. 511, and in the opinion of this court in that case the purpose of the act was stated as follows:

> "The Act of 1874 was passed to help homestead and other settlers who were in hard case because they had established their settlement after the grant to the Railroad Company was held to have attached. The question when it did attach was for a long time doubtful and the subject of litigation. This Act of 1874 was intended to induce the railroad companies to relinquish such lands thus illegally occupied as against them by promising in lieu thereof other lands of equal area in both odd and even sections within the prescribed limits."

That case, it may be noted, involved an unsuccessful attempt by the railroad company to have the Act of 1874 construed as in *pari materia* with the Act of 1866, so that certain provisions of the original granting act could be applied to lieu selections under the Act of 1874. The same contention, rejected in that case, is now adopted by the Secretary of the Interior in support of his action in the case at bar, No. 98.

As to the clause in the Act of 1874 which provided that the railroad company shall receive title to the selected lands "the same as though originally granted"—it was held in the same case, in the Court of Appeals, 54 App. D. C. 161, 163, that this did not mean that the company's right was to be measured by the terms of the original granting act but that it referred

> "merely to the kind of title and the avenue through which it shall pass, and does not relate to the quality of the land to be selected, or invest the railroad company with any right of selection equivalent to that provided in the original grant. They are words of conveyance, not of power."

The Act of April 28, 1904, was likewise a remedial act which plainly and in simple terms offered a trade, section for section, of public lands of the United States for lands owned by the railroad company. Its legislative history shows that it was enacted because the lands in New Mexico sought by the United States for the benefit of certain settlers were small holdings of 160 acres or less which the railroad company was unwilling to relinquish under the Act of 1874 (such small tracts occupied by settlers being ordinarily the best land in each section), although willing to relinquish them as parts of whole sections if authorized so to do. H. Rept. 1203, 58th Congress, 2nd Session; Cong. Recd., vol. 38, part 3, p. 2900.

The Act of 1904 came before this court in *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, in a case similar to the case at bar, No. 97, to enjoin the Secretary of the Interior from

rejecting selections under the Act of 1904. In that case it was held that the Secretary in acting on the selections in question had exceeded his authority and the powers conferred upon him by the statute when he took into account facts not known at the time the selections were filed, and that the railroad company was entitled to an injunction against the rejection and cancellation of the selections on that ground.

The chief difference between the Acts of 1874 and 1904 is that the former was a general act applicable to all railroad grants, and the Act of 1904 was a special act applicable only to the Atlantic and Pacific grant in New Mexico.

The fundamental error on which the action of the Department of the Interior in these cases is based is in the appraisal and characterization of the Acts of 1874 and 1904. Thus the Secretary's decision on the selections involved in No. 97 (R. 10), after referring to certain earlier acts which recognized the validity as against the United States of the claims of certain settlers, states:

> "From the foregoing, it is evident that the purpose of the act of April 28, 1904, was to reimburse the Santa Fe Company for losses in the grant of July 27, 1866, occasioned by the inability of the United States to furnish good title to lands acquired from Mexico under the treaty of Guadalupe-Hidalgo in 1848 and the Gadsden purchase of 1853 which were occupied by settlers who had entered in good faith."

On the contrary, it is perfectly clear and has never been questioned that respondent and its predecessor had good title to the lands sought to be recovered by the United States under the Act of 1904, had suffered no "losses" from the grant, and there was no "inability" on the part of the United States to furnish "good title" to the railroad company. As the Court of Appeals pointed out in its opinion in these cases.

> "The lands released pursuant to the 1874 and 1904 Acts had for all practical purposes vested in the railroad.
>
> * * * *

"Viewed from a slightly different perspective, it will be seen that the government could not have reached the lands relinquished under the 1874 and 1904 Acts had the railroad refused to reconvey—as it had the unquestioned right to do. This was specifically admitted by the Solicitor for appellees in the oral argument in response to a direct question from the court. Admittedly also the lands given up by reconveyance would not have been returned to the government by the release under the 1940 Act." (R. 41).

The contention that the Acts of 1874 and 1904 were in legal effect amendments of the Act of 1866 and are to be read as in *pari materia* with the Act of 1866 is likewise unsound and inconsistent with the decision of this court in *Santa Fe Pacific R. Co.* v. *Work, supra.* The Acts of 1874 and 1904 gave rise to contractual obligations separate and distinct from those of the Act of 1866. This too is clearly pointed out in the opinion of the Court of Appeals in these cases:

"Our decision rests on what we regard as the distinctly separate character of the contractual obligations. Under the 1866 Act the government granted land as an incentive to build. Under the 1874 and 1904 Acts the government granted land in exchange for that which it wished others to have free from any possible claims of the railroads, which admittedly had good title. To say that because the lands reliquished were granted "in aid of construction" other land claims accepted in place and stead of the relinquished lands are to be regarded as subject to the terms of the original grant is, we think, to ignore the succeeding transactions and vitiate contractual rights arising wholly independently of the original Act. We do not believe that such was the intention of Congress."

* * * *

"Even regarding the Acts of 1866, 1874 and 1904 as a part of the same 'legislative scheme' does not preclude the result we have reached. Unquestionably the acts are by their character related to the same general problem of adjusting railroad land claims, but this

> does not foreclose the possibility of separate rights being established as they were by reason of independent transactions in accordance with the respective provisions of the different statutes." (R. 41, 42)

Only the most strained construction of the Acts of 1874 and 1904 can justify the conclusion that selections under those acts, in completion of voluntary and partially executed exchanges, are claims to lands granted in aid of construction.

III. The relief sought—by injunction or mandatory order—is within the jurisdiction of the courts below and the granting of such relief in these cases does not encroach on the lawful exercise of any discretion vested in the Secretary of the Interior.

The question whether upon a proper showing of facts an aggrieved party is entitled to a judicial review of the action of an administrative officer, such as the Secretary of the Interior, and that such review may be had by an action for injunction or mandamus in the courts of the District of Columbia, has recently been given consideration by this court in *Stark* v. *Wickard*, 321 U. S. 288.

The historic use of the remedy of injunction or mandamus in cases involving the Secretary of the Interior and rights claimed under the public land laws is supported by many cases. *Santa Fe Pacific R. Co.* v. *Lane*, 244 U. S. 492; *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228; *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197; *Ickes* v. *Fox*, 300 U. S. 82.

Santa Fe Pacific R. Co. v. *Fall*, for example, was a suit to enjoin the Secretary of the Interior from rejecting and cancelling selections under the Act of 1904, and the use of injunction as a remedy was approved, the opinion of this court on that point being as follows:

> "The government argues that there was no jurisdiction over the bills because the question whether the lands selected were of the same quality as those relinquished rested wholly in the judgment of the Secre-

> tary. But the position of the Railroad Company is that the Secretary went beyond the powers conferred upon him by the statute when he took into account facts not known at the time of the selection, and we are of opinion that the company is entitled to bring that question into court." 259 U. S. 197, 198-199.

Compare *Payne* v. *Central Pacific R. Co.*, 255 U. S. 288, where this court said:

> "Our conclusion is that, in giving effect to the withdrawal as against the prior selection, which admittedly was valid when made, the appellants departed from a plain official duty, and that to avoid the resulting injury to the plaintiff, for which no other remedy is available, an injunction should issue directing a disposal of the selection on its merits, unaffected by the withdrawal."

The brief for petitioners (pages 47-54) includes a discussion of the Administrative Procedure Act, Public Law No. 404, 79th Congress, Second Session, approved on June 11, 1946, the argument being that Section 10 of the Act—on judicial review—which became effective on September 11, 1946, has no bearing on these cases.

Respondent makes no point that the Administrative Procedure Act has conferred on respondent a right of action which it did not already have, but respondent suggests that the act is a legislative recognition of the correctness of respondent's position on the question of remedy and of respondent's right to a judicial review of the action of the Secretary of the Interior and his associates in these cases, on the authorities above cited.

There can be no doubt—as is conceded in the brief for petitioners (page 49)—that Section 10 of the Administrative Procedure Act was intended *to restate existing law.*

What then is the existing law which Section 10 has restated?

Section 10 provides explicitly that—except so far as statutes preclude judicial review, or agency action is by law committed to agency discretion —

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

* * * *

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

Certainly, if this is a restatement of existing law, it disposes of any contention that the Secretary of the Interior acting in such a matter as this is above the law or that his construction of the public land laws is the exercise of a non-reviewable discretion.

The real question is the cases at bar is whether the Secretary of the Interior is right or wrong in his construction of the Acts of 1874 and 1904 and in his refusal to recognize respondent's rights to the lands in question, selected in completion of the voluntary exchanges initiated and partly executed pursuant to those acts. If he is wrong, respondent's right to the relief prayed is clearly established under the decisions cited.

Respectfully submitted,

LAWRENCE CAKE,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

Nos. 97 and 98.—October Term, 1946.

Julius A. Krug, Secretary of the Interior, et al., Petitioners, 97 v. Santa Fe Pacific Railroad Company. Julius A. Krug, Secretary of the Interior, et al., Petitioners, 98 v. Santa Fe Pacific Railroad Company.	On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

[February 3, 1947.]

Mr. Justice Black delivered the opinion of the Court.

In the first half of the Nineteenth Century the United States acquired a vast new area of sparsely populated lands in the South and West. Settlement and absorption of this territory into the older part of the country became a national problem which demanded for its solution a more rapid and extensive means of transportation of goods and people than was provided by wagons, stagecoaches, and waterways. The building of railroads largely provided the answer. They made it possible for the frontier homesteads and communities to be established on the lands of the new territory and yet maintain live contact with the national economy and culture. To encourage a rapid railroad building program, Congress chose to make public grants of a large proportion of the new lands to underwrite and subsidize the participation of private individuals and privately owned companies in the program.[1] In this con-

[1] For an account see *Public Aids to Transportation*, Section of Research, Federal Coordinator of Transportation (1940) I, 45–46; Heaton, *Land Grants*, Encyc. Soc. Sciences (1935) IX, 32–35.

gressional program of land grants "in aid of construction" were sown the seeds of the present lawsuit.

Enormous areas of public lands were granted railroads, almost equal to the acreage of the New England States, New York and Pennsylvania combined.[2] Execution of the land-grant program was marked by innumerable complex and unforeseen difficulties; its course has been beset by claims and counterclaims asserted by and between settlers, railroads, and Government.[3] Congress, the executive agencies, and the courts have been repeatedly called upon to help resolve these conflicting claims. The lapse of nearly a century since the program was instituted has not resolved all of them. This lawsuit requires consideration of old and recent congressional efforts to settle these persistently recurring controversies.

One substantial field of railroad-government controversy has been the terms of the original land-grant acts which required the railroads to carry Govenment goods and personnel free of tolls. By reason of judicial interpretation of these terms, as supplemented by periodic legislation,[4] land-grant railroads for more than half a century immediately prior to 1940 transported for the Government

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[2] Heaton, *Land Grants, supra*, 35. Other sources put the figure of federal grants-in-aid at 134,303,668 acres, equivalent to 204,849 square miles or 6.93 per cent of the area of the continental United States. Seventy railroads received these grants. *Public Aids to Transportation, op. cit. supra*, n. 1, 13. See also *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 273.

[3] See *Public Aids to Transportation, op. cit. supra*, n. 1, II, 5–56, Gates, *Land Grants to Railways*, Dictionary of Amer. Hist. (1940) III, 237. See also cases collected 43 U. S. C. A. §§ 888, 890, 893, 894, 900, 904; 43 F. C. A. §§ 888, 890, 893, 894, 900, 904.

[4] See *Lake Superior & M. R. R.* v. *United States*, 93 U. S. 442; *Atchison, T. & S. F. R. R.* v. *United States*, 15 Ct. Cls. 126, 148; *Cf.* 18 Stat. 72, 74; 18 Stat. 452, 453–454; 20 Stat. 377, 390; 27 Stat. 174, 180.

at one-half of the standard commercial rates. During the depression years beginning in the late 1920's and immediately following, railroad earnings declined considerably, and a movement began to relieve the roads of their land-grant rate obligations. Studies by some Government selected agencies recommended legislation for outright repeal of the provisions for rate concessions to the Government.[5] Bills to accomplish this in the 75th and 76th Congresses failed to pass.[6] But § 321 of the Transportation Act of 1940[7] provided that land-grant roads could, by compliance with specified conditions,[8] collect from the

[5] See Committee of Three: Report of March 24, 1938, H. Doc. No. 583, 75th Cong., 3d Sess., 32; Committee of Six: Report of December 23, 1938, in Hearings, House Committee on Interstate and Foreign Commerce on H. R. 2531, 76th Cong., 1st Sess., II, 260.

[6] H. R. 10620, 75th Cong.; S. 3876, 75th Cong.; S. 1915 and S. 1990, 76th Cong.

[7] 54 Stat. 954, 49 U. S. C. § 65.

[8] Section 321 (b) provides that

"If any carrier by railroad . . . or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to (reduced rate) compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interest in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find to have been heretofore sold

Government full commercial rates, except for the transportation of military and naval freight and personnel. In brief, it required that a railroad, to qualify for full rates, must execute, within a year after passage of the Act, a release of any claim it might have "against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands, which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any . . . predecessor in interest *under any grant* to such carrier or such predecessor in interest as aforesaid." (Italics supplied.)

Shortly after passage of this Act respondent took advantage of it, and gave the Government a release framed substantially in the words of the statute.[9] Its predecessor in

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by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

[9] "Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

"This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior ot September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad."

interest had obtained a grant to lands in Arizona and New Mexico, under an Act of 1866 containing the usual governmental rate concession terms. 14 Stat. 292, 297.[10] The 1866 Act had specifically recited that if the Government, because of prior settlement of part of the granted lands by homesteaders, could not give possession to some of the lands granted to the railroad, it could select, under the direction of the Secretary of the Interior, other public lands in lieu of them as an indemnity. Respondent had large outstanding claims against the Government for these "indemnity" lands when it signed the release and concedes that the release extinguishes these claims.

But it had other so-called lieu land claims against the Government which it asserts were not extinguished. The railroad urges that these claims are not covered by the Act or by the release. They, allegedly, are not claims "on account of" or "under any grant" of lands, but rest on contractual exchanges of lands made under the Acts of 1874 and 1904. 18 Stat. 194; 33 Stat. 556. These Acts largely represented a congressional effort to settle conflicts among railroads, Government, and settlers, which arose by reason of settlement by homesteaders on railroad-granted lands after the grants had been made. Both Acts provided that where settlers had so occupied railroad-granted lands, the railroad could, upon relinquishment of its title to them, select other lands in lieu of them. The procedure for selecting the lieu lands under the 1874 and 1904 Acts was substantially identical to the original procedure provided by the Acts for selection of indemnity lands. Before the 1940 Act respondent had, under the 1874 and 1904 Acts, relinquished title to the Government to certain lands previously granted. In August 1940, and subsequently in March 1943, respondent filed applications with the Secretary of the Interior to select its lieu lands. After the re-

[10] *Cf.* note 4, *supra*.

spondent signed the release, and because of it, the Secretary rejected the applications. The railroad then filed this suit in a Federal District Court for relief by injunction or by way of mandamus to require the Secretary and other Interior Department officials to pass on its applications without regard to the release. The District Court dismissed the bill on the merits, holding that the statute and release barred the claims. It read the 1940 Act as defining a congressional purpose "to wipe the slate clean of such claims by any railroad which enjoyed the benefits of the rate concessions made by the Transportation Act . . ." 57 F. Supp. 984, 987. The Court of Appeals for the District of Columbia reversed, holding, as respondent urges in this Court, that the 1940 Act did not apply to the type of claims involved here. 153 F. 2d 305. Importance of the question decided caused us to grant certiorari.

We agree with the District Court. We think, as it held, that the Secretary of the Interior's construction of the 1940 Act was clearly right. Therefore, we do not discuss the Government's contention that, since the Secretary's construction was a reasonable one, it was an allowable exercise of his discretion which should not be set aside by injunction or relief in the nature of mandamus. See *Santa Fe P. R. R.* v. *Work*, 267 U. S. 511, 517; *cf. Santa Fe P. R. R.* v. *Lane*, 244 U. S. 492.

The respondent argues the case here as though the 1940 Act only applied to claims for "lands under any grant." The language is not so narrow. It also required railroads to surrender claims for "*compensation, or reimbursement* on account of lands, or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted . . . under any grant." (Italics supplied.) This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope

so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants. Beyond a doubt the words "compensation" and "reimbursement" as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them "under a grant." [11] If they do not have this meaning, their use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion that the 1940 Act covers claims such as respondent's seems inescapable.

The legislative history of the Act shows that Congress was familiar with these controversies. In 1929 it passed an Act intended to authorize and require judicial determination of land grant claims of the Northern Pacific Railroad in order finally and completely to set them at rest. 46 Stat. 41. The suit authorized by that Act was tried in a Federal District Court and was pending in this Court when the 1940 Act was passed. *United States* v. *Northern Pac. Ry.*, 311 U. S. 317. Our decision in it shows the complexity and ramifications of the numerous questions involved in land grant controversies. Reference to this case was made by Government officials in urging Congress to include in the predecessors of the 1940 Act a requirement that the railroad surrender all claims arising out of land grants as a prerequisite to any Government rate concessions.[12] Here, as in the 1929 Act, which applied to the claims of only one railroad, we think Congress intended to bar any future claims by all accepting railroads which

[11] See *United States* v. *Northern P. Ry.*, 311 U. S. 317, 332, 335, 353, 354.

[12] See Hearings, Subcommittee of the Senate Committee on Interstate Commerce, S. 1915, 1990 and 2294, 76th Cong., 1st Sess., 65, 66; see also *ibid.*, 59, 164.

arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing—the land grants. We think Congress wrote finis to all these claims for all railroads which accepted the Act by executing releases.

Reversed.